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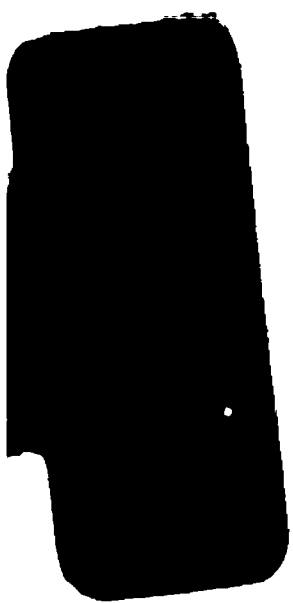
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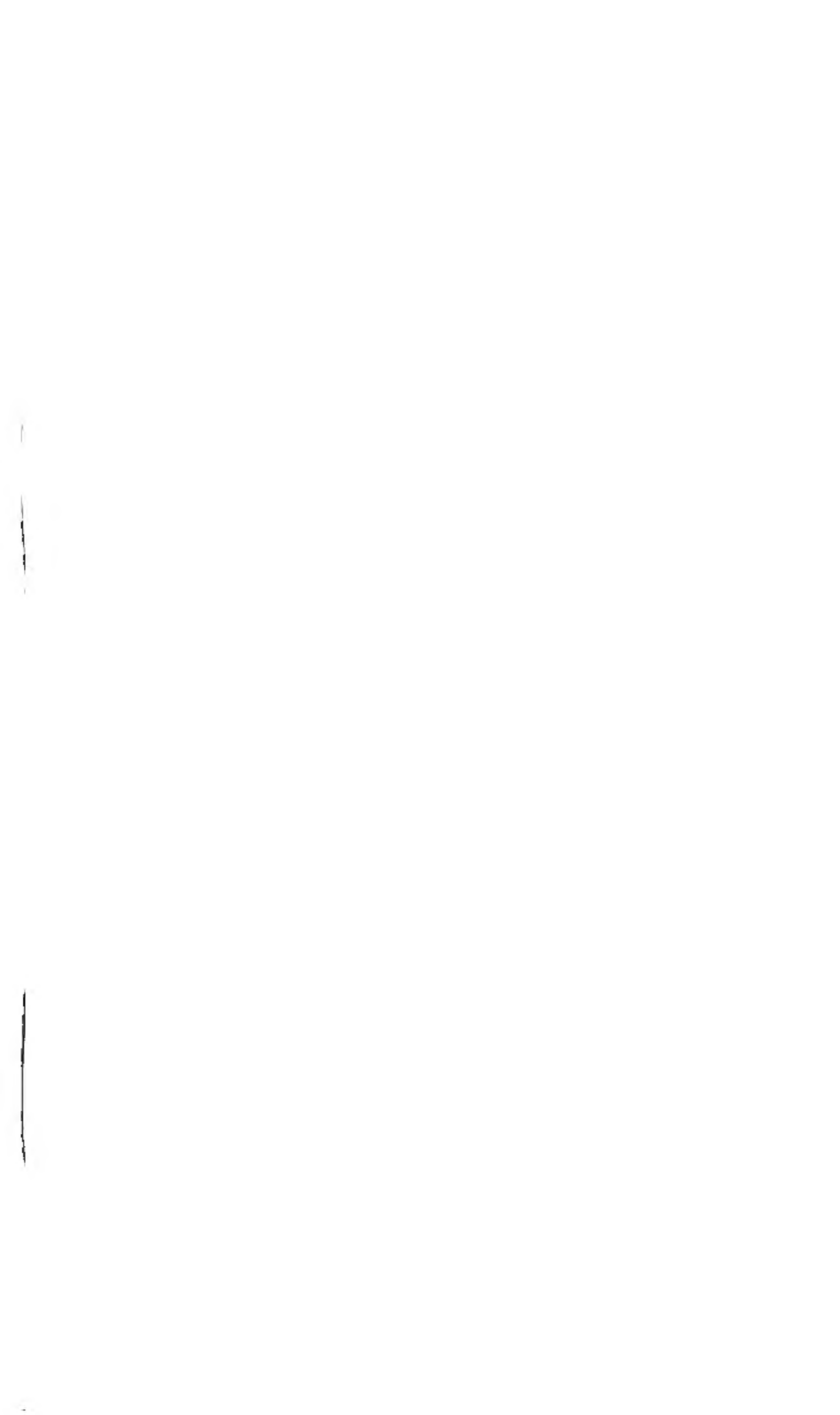
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THE
AMERICAN DECISIONS

CONTAINING THE
CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN
THE COURTS OF THE SEVERAL STATES


FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED
BY A. C. FREEMAN,
COUNSELLOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

Vol. LIX.

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AMERICAN DECISIONS.

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AMERICAN DECISIONS.
VOL. LIX.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

LEWIS v. ROSS.

[37 MAINE, 230.]

WHERE PERSONAL PROPERTY IS SOLD TO BE PAID FOR WHEN DELIVERED, and a part only is delivered under the contract, the property in the part not delivered still remains in the vendor.

ONE WHO IS SUMMONED AS TRUSTEE, AND DISCLOSES AT FIRST TERM, is entitled to his costs, and authorized to deduct the amount thereof from the amount in his hands. And he can not be deprived of them by any mere informality in the record, or misprision of the clerk, in omitting to recite in the judgment the allowance of such costs.

COURT OF RECORD MAY CORRECT MISTAKES IN ITS RECORDS, which do not arise from the judicial action of the court, but from the mistakes of its recording officer; and this it may do, either on suggestion or motion of those interested, or upon its own certain knowledge and mere motion.

PREVAILING PARTY IN CIVIL ACTION IS ENTITLED TO COSTS which follow the judgment as of course, and practically are incorporated into the judgment by the clerk, without any special order, unless upon objection or special hearing.

WHERE COSTS TO WHICH PARTY IS ENTITLED ARE BY MISTAKE OF CLERK OMITTED from the judgment, the record of the judgment may be corrected and amended so as to show that the legal costs were allowed.

SCIRE FACIAS. The opinion states the case.

N. D. Appleton, for the plaintiff.

D. Goodenow, for the defendant.

By Court, HOWARD, J. The defendant was adjudged trustee of Warren, and this suit is brought to determine the amount for which he was accountable upon his disclosure. By that it appears that the defendant had contracted for "a lot of hay, two

cows, and yoke of steers," with the principal, and "was to send for the hay, cows, and steers, and pay for the same when delivered." Before the service of the trustee process upon him, he had sent for and received a portion of the hay, for which he had made payment in part. Neither the remaining portion of the hay nor the cows nor the steers were delivered or received under the contract. For the property received and not fully paid for, it is admitted that the defendant was held as trustee.

It is contended that the contract was entire, and that, as the defendant had taken a part of the goods, he had the right to the possession, and the power to take immediate possession of the whole; and that he must be regarded as having the whole property intrusted to him, within the meaning of the statute, and charged accordingly: R. S., c. 119, sec. 4. But it appears that the property not delivered under the contract remained in possession of the principal, and did not pass to the defendant. It was open to attachment as the property of the former, and could not be subject to attachment as the property of the latter. The sale had not been perfected under the contract. Though the steers were temporarily in the keeping of the defendant, they were taken and used by persons employed by him to haul the hay, but without his authority, and he refused to receive them or pay for them. They were not, then, in his possession under the contract, and were not goods or effects of the principal intrusted or deposited in his hands, within the intent of the statute. His claiming to hold them after the trustee process was served upon him can not change the facts, or right to the property at the time of the service. This is unlike the case of *Lane v. Nowell*, 15 Me. 86, cited for the plaintiff. There the goods appeared to have been delivered to the trustee, and he had engaged to account for them, and actually controlled them under the conveyance and written contract.

The defendant was chargeable only for the unpaid balance due for the hay received as trustee. That amount, after deducting his costs on disclosure, he paid to the officer holding the execution, on demand. We do not understand that the amount of such balance or costs are in controversy. But it is contended that no deduction should have been made for the trustee's costs, and that the whole balance should have been paid to the officer.

The defendant, having duly submitted to an examination on oath at the first term and disclosed, and having been adjudged trustee, was entitled to his costs, and authorized "to deduct from the amount in his hands the amount of such costs:" R. S.,

c. 119, secs. 16, 17. He claimed to retain his costs as taxed in court, and the taxation and claim form a part of his disclosure. But no specific or separate judgment for such costs appears of record, or was noted upon the docket. The judgment, charging him as trustee upon his disclosure, established his right to his costs, which are secured to him by statute. It was a substantial finding for him, though not properly docketed and recorded. The judgment appears to have been imperfectly recited in its details, and the record is incomplete. But it would not comport with the justice of the case, that a party clearly entitled to his costs should be deprived of them by a mere informality in the record or misprision of the clerk. Errors of this kind are not errors in the judgment of the court, in point of fact, and are amendable at any time.

“The forms of the court are always best used when they are made subservient to the justice of the case,” said Lord Kenyon, in *Mara v. Quin*, 6 T. R. 8. In *Cradock v. Radford*, 4 Mod. 371, the court ordered the roll to be brought in and amended, after the judgment had been signed twenty years: *Hanckford v. Mead*, 12 Id. 384; *Short v. Coffin*, 5 Burr. 2730. In *Mechanics' Bank v. Minthorne*, 19 Johns. 244, the court, on motion, ordered the entry of satisfaction of the judgment, and all proceedings in the case subsequent to the interlocutory judgment at a previous term, including the assessment of damages, to be vacated, and the record of the judgment to be canceled, and the damages to be reassessed: *Chichester v. Cande*, 3 Cow. 89 [15 Am. Dec. 238]; *Hart v. Reynolds*, 8 Id. 42, note *a*, where the court adopted the result of the learned research of counsel, in allowing the amendment of the record of the judgment, and proceedings connected therewith, filed six years previously.

This court has sanctioned the same doctrines, and amended its records in furtherance of justice and according to the truth of the case: *Crofton v. Ilsley*, 6 Greenl. 48; *Wright v. Wright*, Id. 415; *Limerick, Petitioners*, 18 Me. 183; *Hall v. Williams*, 10 Id. 278.

Although no motion has been presented to us to allow the amendment in this case, yet the error is apparent, and the subject is before us upon the facts and documents connected with the imperfect record, and addresses itself to our discretion. Shall the record stand as it is, stamped with an infirmity, to perpetuate a wrong? Or shall we cause an amendment to supply the deficiencies that have occurred by accident or mistake, and when it is evident that no one can suffer by the correction?

On general principles, it is competent for a court of record, and incident to its authority, to correct mistakes in its records which do not arise from the judicial action of the court, but from the mistakes of its recording officer. In doing this, it may regulate its own action upon its own sense of responsibility and duty, and proceed upon suggestion, or on motion of those interested, or upon its own "certain knowledge and mere motion." It would not be an adversary proceeding in which, of necessity, there should be parties, or in which notice would be required: *Balch v. Shaw*, 7 Cush. 282.

It would seem that no lapse of time will divest the court of its power, or absolve it from its duty, to supply deficiencies in the records of its own proceedings, where justice and the truth of a case require it, and when it is enjoined by statute: R. S., c. 150, secs. 14, 15.

In civil actions, the prevailing party is entitled to costs, and they follow the judgment, as of course, either on verdict, nonsuit, or default, and practically are taxed, allowed, and incorporated into the judgment by the clerk, without any special order, unless upon objection or special hearing.

In *Norris v. Hall*, 18 Me. 332, it did not appear that the trustee appeared at the first term and submitted to an examination; or that any costs were taxed, claimed, or allowed for him, or that he was entitled to any by judgment of court.

We are of opinion that the record of the judgment of this court in the original suit should be corrected and completed, so that it will show expressly that the legal costs taxed and claimed by the trustee in his examination and disclosure under oath at the first term were allowed. Then judgment should be entered for defendant according to the agreement.

SHEPLEY, C. J., and RICE, HATHAWAY, and CUTTING, JJ., concurred.

TITLE TO PERSONAL PROPERTY DOES NOT PASS TO VENDEE BY SALE THEREOF WITHOUT DELIVERY: *Golder v. Ogden*, 53 Am. Dec. 618, note 619, where other cases are collected.

COSTS.—Taxing costs is a judicial act, and a justice of the peace who does not render judgment for costs within the time allowed him to render judgment can not do so afterwards: *Sibley v. Howard*, 45 Am. Dec. 448; costs were not recoverable at common law: *Hart v. Skinner*, 42 Id. 500; *Turnham's Ex'x v. Shouse*, 33 Id. 473. When not allowed: See note to *Turnham's Ex'x v. Shouse*, Id. 475. Costs at law and in equity: See note to *Saunders v. Frost*, 16 Id. 405, where this subject is discussed.

SYMONDS v. HALL.

[37 MASS. 354.]

WHERE LEASE OF FARM PROVIDES THAT HALF THE HAY RAISED ON IT shall be consumed thereon by cattle kept by the lessee, and the other half be divided between the lessor and the lessee, the property in the whole of the hay remains in the lessee until the division is made. The lessor has no claim ~~in rem~~ upon it before division. When the division is made under the contract, the portions divided vest separately in the lessor and lessee, but the undivided half to be consumed on the farm still remains the property of the lessee.

SHERIFF WHO SEIZES ON EXECUTION GOODS OF ONE NOT DEBTOR is a trespasser, and one who purchases such goods at the sheriff's sale acquires no title to them as against the owner. And if such purchaser removes the property after the sale, with the assistance of the officer, the owner may recover against them as joint trespassers.

DAMAGES FOR SEPARATE TRESPASS OF ONE OF TWO DEFENDANTS can not be included in a joint judgment against both.

TRESPASS de bonis asportatis for a quantity of hay. The defendant Hall claimed to have seized and sold the hay as a deputy sheriff, on an execution against one James H. Foster, as his property; and defendant Morrill claimed that he was the owner of the hay, having bought it at a public sale by Hall, the other defendant. The plaintiff was the owner of the farm on which the hay was cut. After the making of the division referred to in the opinion, the defendants came with teams and took and carried away the greater part of the hay that had been set off to the plaintiff. The other facts are stated in the opinion.

Fessenden and Deblois, for the plaintiff.

Shepley and Dana, for the defendants.

By Court, HOWARD, J. The contract between the plaintiff and Foster was in legal effect a lease, by which the latter was entitled to the "use and benefit" of the farm of the former, "with all the products of the farm and benefit of the buildings, excepting what is hereinafter mentioned." The lessor reserved to himself a specified portion of the dwelling-house, and "a privilege of stowing the hay that is now in the barn, and his part of the hay to be cut on the farm, until sold or disposed of." The lessee was to "carry the farm on well, secure the hay in good season and order," and, as stipulated in the lease, "one half of the hay cut on the farm is to be eat by the stock kept on the farm; the other half of the hay is to be

divided equally between the contracting parties." There is no provision in the agreement as to keeping stock upon the farm, excepting what applies to the lessee. He was to have a sufficient part of the barn and shed to "stow and keep all his part of the hay cut on the place, and the stock he may keep to eat up his part of the hay;" and he was to pay forty dollars rent annually.

Under this contract, Foster, the lessee, entered into possession, and cultivated the farm and secured the products, as it seems, according to the agreement. He thus became owner of the entire products, until there had been a division of the hay as stipulated in the agreement. Till then, the plaintiff could not take any portion of the hay as his own property; but his rights and remedies were *ex cathedra* in respect to the lease, upon the stipulations of the lessee. The contract, until executed, gave him no claim *in rem* upon the hay or other crops of the farm: *Bailey v. Fillebrown*, 9 Greenl. 12 [23 Am. Dec. 529]; *Dockham v. Parker*, Id. 137 [23 Am. Dec. 547]; *Turner v. Bachelder*, 17 Me. 257; *Garland v. Hilborn*, 23 Id. 442; *Butterfield v. Baker*, 5 Pick. 522. These cases fully support this construction of the agreement between the plaintiff and Foster.

The evidence establishes the fact of a division of the hay, contemplated by the parties to the lease, before the attachment. By that division the plaintiff became possessed, as owner, of the "first mow or scaffold next to the road," and the "ground mow below the top of the girts," in the large barn, as his quarter part of the hay cut upon the farm. But to the "undivided half" of the hay he acquired no title, by division or by delivery. This remained the property of the lessee, upon the legal construction of the contract, as before stated.

By an act of trespass one can not acquire a right in the property of another, as against him. An officer who seizes on execution the goods of one who is not the debtor is a trespasser; and if he keep and sell them, these are but additional acts of trespass, commencing, continuing, and ending in wrong, and from which no rights accrue against the owner. The purchaser can acquire no title to the goods from one who had no right to them; for neither the official character of the vendor nor the publicity of the sale can legalize the trespass and sustain the purchase: *Wheelwright v. Depeyster*, 1 Johns. 471 [3 Am. Dec. 345]; *Carter v. Simpson*, 7 Id. 535; *Saltus v. Everett*, 20 Wend. 267 [32 Am. Dec. 541]; *Commonwealth v. Kennard*, 8 Pick. 133; 1 Ch. Pl. 185; *Cooper v. Chilly*, 1 Burr. 32. But sales of prop-

erty authorized by law will be upheld, notwithstanding irregularities in the proceedings of the vendor in effecting the sale. Public policy requires that the innocent purchaser should not suffer by the neglects of an officer in executing a legal precept within his authority and jurisdiction: *Ladd v. Blunt*, 4 Mass. 402; *Hunter v. Perry*, 33 Me. 159. So if one obtain goods by fraudulent purchase, which is void in respect to himself, and transfer them to another *bona fide* and without notice, the property has been held to pass to the latter, and the vendor can not maintain trespass for the property: *Mowrey v. Walsh*, 8 Cow. 238; *Parker v. Patrick*, 5 T. R. 175.

In taking and selling the hay of the plaintiff, on the scaffold on November 15, on an execution against Foster, after the division had been effected, the defendant Hall was a trespasser; and Morrill, the other defendant, by purchasing that portion of the hay and removing it with the assistance of the officer, became a joint trespasser; and both will be held responsible to the plaintiff for the damages accruing to him from that sale of his hay. The officer Hall is also accountable in like manner for taking, selling, and delivering to others the remaining portion of the plaintiff's hay in the "ground mow" on November 29th, in which Morrill did not participate, and for which he is not accountable upon the pleadings and proof.

The plaintiff is entitled to judgment against both defendants for the joint trespass, but not for the several trespass of Hall. Or he may discontinue as to Morrill, and take judgment against Hall for both trespasses.

As we are unable from the evidence reported to assess the damages accurately, there must be a further hearing for that purpose, unless the amounts shall be agreed upon by the parties.

Defendants defaulted.

SHEPLEY, C. J., and TENNEY and APPLETON, JJ., concurred.

OFFICER WHEN TRESPASSER AB INITIO: See *Paul v. Slason*, 54 Am. Dec. 75, note 80; *Hooker v. Smith*, 47 Id. 679, note 682; *Malcom v. Spoor*, 46 Id. 675, note 676, where other cases are collected.

LIABILITY OF OFFICER FOR WRONGFUL SEIZURE: See *Tufts v. McClintock*, 48 Am. Dec. 501, note 504.

ONE WHO CULTIVATES ANOTHER'S LAND FOR SHARE OF CROP can not transfer his share to a third person before a division of the crop is made: *McNeeley v. Hart*, 51 Am. Dec. 377, note 379. Cropper has no such interest in the crop as can be subjected to the payment of his debts while it remains *en masse*; until a division, the whole is the property of the landlord: *Brazier v. Ansley*, Id. 406, note 410, where this subject is discussed.

WALDRON v. CHASE.

[37 MAINE, 414.]

WHERE OWNER OF LARGE QUANTITY OF CORN IN BULK SELLS TO ANOTHER a certain number of bushels of it, and the vendee pays for the whole of what he buys and takes away a part thereof, leaving the rest for his convenience, without charge for storage, in the vendor's store, the property in the whole of the corn sold passes to the vendee, and is at his risk.

ASSUMPSIT CAN NOT BE MAINTAINED WITHOUT EVIDENCE OF EXPRESS PROMISE TO PAY, or proof of facts from which such a promise can be implied.

ASSUMPSIT. The opinion states the case.

Willis and Fessenden, for the plaintiffs.

Shepley and Dana, for the defendant.

By Court, HATHAWAY, J. The defendant had in his store some fifteen thousand bushels of corn in bulk, of which he sold to the plaintiffs five hundred bushels, December 1, 1851, and received his pay. The plaintiffs were millers, and for their own convenience and without charge for storage, left the corn in the defendant's store, and took, as they wanted to use it, between the first and seventh of December, two hundred and seventy-six bushels. On the seventh of December the defendant's store and most of the corn in it were destroyed by fire, and the plaintiffs bring this action to recover payment for the balance of the five hundred bushels. The action is by the vendees against the vendor, and one question presented is, whether or not, as between them, the property in the whole five hundred bushels passed to the vendees by the sale.

The plaintiffs contend that, although they had paid for the whole, yet they had received only two hundred and seventy-six bushels, and that, until they had actually received the whole, or it had been measured out to them and separated from the mass, what remained in the store was not legally delivered, and was at the risk of the vendor.

There is an apparent conflict of the authorities upon this subject, arising, perhaps, more from a difference of the facts in the cases in which the question has been presented, or from a difference in the forms of actions by which parties have sought to vindicate their rights, than from any real difference of opinion concerning the law.

In this case the contract of sale was complete. The corn was paid for, and a part of it taken by the plaintiffs, who had the

right to take the residue, when convenient for them, in the ordinary course of their business. Nothing more was necessary to be done on the part of the vendor, and, both upon principle and according to the law as adduced from the authorities cited by counsel in the case, the property passed to the vendees, and was at their risk: 2 Bla. Com. 447, 448; *Damon v. Osborn*, 1 Pick. 476 [11 Am. Dec. 229]; *Riddle v. Varnum*, 20 Id. 280.

But the plaintiffs claim that, as a portion of the corn was saved from the fire, they are entitled to recover payment for that. This is an action of *assumpsit*, and the case finds no evidence of an express promise to pay the plaintiffs for the corn saved, nor does it furnish any proofs from which a promise can be implied, and a nonsuit must be entered.

SHEPLEY, C. J., and HOWARD, RICE, and CUTTING, JJ., concurred.

DELIVERY, WHAT IS SUFFICIENT TO PASS TITLE: See *Messer v. Woodman*, 53 Am. Dec. 241, note 248, where other cases are collected. The principal case is cited in *Phillips v. Moore*, 71 Me. 81, and in *Cloud v. Moorman*, 18 Ind. 43, in support of the proposition stated in the first paragraph of the syllabus.

NO SALE OF PERSONAL PROPERTY IS COMPLETE so as to vest an immediate right of property in the buyer, so long as anything remains to be done as between the buyer and seller; hence, where a person bargained for some corn, in pens on the bank of a river, at one dollar per barrel, to be subsequently measured, and the corn is destroyed by flood before being measured, the loss must fall on the seller: *Williams v. Allen*, 51 Am. Dec. 709, note 711; see also *Brazier v. Ansley*, Id. 408.

MOULTON v. LIBBEY.

[37 MAINE, 472.]

BY COMMON LAW, PEOPLE HAVE RIGHT TO FISH IN SEA OR CREEKS, or arms thereof, as a public common piscary, and can not be restrained from exercising this right except in those places, creeks, or navigable rivers in which either the king or some particular subject has acquired a proprietary interest, exclusive of such common liberty.

SHORES OF SEA AND NAVIGABLE RIVERS, WITHIN FLUX AND REFLUX OF TIDE, belong *prima facie* to the king, and may belong to a subject; but the *jus privatum* of the proprietor is subject to the *jus publicum* which belongs to the king's subjects.

WHATEVER RIGHT KING BY HIS PREBOGATIVE HAD IN SHORES OF SEA and of navigable rivers, he held as a *jus publicum* in trust for the benefit of the people for the purposes of navigation and of fishery.

NO GRANT OF SOVEREIGN POWER SHOULD BE SO CONSTRUED AS TO DESTROY OR IMPAIR ANY RIGHT held in trust for the common benefit of the people, if it is capable of any other construction.

COMMON RIGHT OF FISHERY IS CLEARLY RESERVED AND PRESERVED for the king's subjects by the saving clause of the grant from Charles I. to Sir Ferdinando Gorges of the province of Maine. This proviso exhibits a general intention, not only to preserve to the people their common right of fishery, but to afford unusual facilities for its exercise.

TITLE TO SHORE ACQUIRED BY RIPARIAN PROPRIETOR UNDER COLONIAL ORDINANCE OF 1641 does not destroy the common right of navigation or of fishery thereon.

COMMON RIGHT OF FISHERY INCLUDES FISHERY OF CLAMS and the right to dig for the same.

FACT THAT PARTY HAS BEEN ACCUSTOMED FOR SIXTY YEARS TO DIG CLAMS on a certain flat, subject to the flux and reflux of the tide, is not evidence that he has any exclusive right therein.

STATE, REPRESENTING PEOPLE, MAY REGULATE COMMON RIGHTS and privileges of fishing, and an act of the legislature intended to protect and further such rights is valid.

DEBT to recover the penalty prescribed in section 4 of the revised statutes, chapter 61, which provided as follows: "Sec. 4. If any person shall take or otherwise willfully destroy any oysters or other shell-fish, or obstruct their growth in their beds, in any of the waters of this state, except as provided in the two following sections, he shall forfeit to the person suing therefor not less than one dollar, nor more than two dollars, for each bushel thereof, including the shell-fish so taken or destroyed." The other facts are stated in the opinion.

Clifford, Cummings, and Appleton, for the plaintiff.

S. and W. P. Fessenden, for the defendant.

By Court, SHEPLEY, C. J. The plaintiff's right to recover is, by the report, made to depend upon the sufficiency of the defense to prevent it. If the court is "of opinion that the facts set up in defense would not constitute a defense, then the defendant is to be defaulted."

The facts presented in defense are, an attested copy of a "charter of the province of Mayne," from Charles, king of England, to Sir Ferdinando Gorges, bearing date on the third day of April, in the fifteenth year of his reign; and an attested copy of a conveyance from Gorges to Thomas Cammack of one thousand five hundred acres of land described, made on March 15, 1640; an admission that the premises described in the declaration, where the clams were taken, were included in the conveyance to Cammack; and that the defendant may have the same title to them which Cammack had.

The other ground of defense is derived from a long-established custom of taking clams by the owners of the premises.

The defendant's right to take the clams is, therefore, made to rest upon the basis of title, and upon that of a long-established usage.

Assuming that the defendant has acquired all the title which Gorges could convey, a question might be made whether he could thereby acquire any title to the flats, land between high and low water mark. It is not deemed to be important to consider such a question, for by the ordinance of 1641, which has been received as conferring title in this state, the defendant would acquire title to the premises.

The question, therefore, presented by this branch of the defense is, whether the defendant, by becoming owner of the flats, acquired any exclusive right to the fisheries upon them in the tide-waters.

By the common law, as presented from its earliest time to the present in elementary treatises and judicial decisions without any dissent, the people have "a liberty of fishing in the sea or creeks, or arms thereof, as a public common piscary, and may not without injury to their right be restrained of it, unless in such places, creeks, or navigable rivers where either the king or some particular subject hath acquired a propriety exclusive of that common liberty."

The shores of the sea and navigable rivers, within the flux and reflux of the tide, belong *prima facie* to the king, and may belong to a subject. "The *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects:" Hale's *De Jure Maris*, c. 6; *De Portibus Maris*, c. 7. Whatever right the king had by his royal prerogative in the shores of the sea and of navigable rivers, he held as a *jus publicum* in trust for the benefit of the people for the purposes of navigation and of fishery. These positions have been approved in judicial decisions too numerous to be mentioned. They are not known to have been denied by any respectable authority.

The title of the defendant to impair this common right of fishery, and to assert an exclusive right, may be more conveniently considered as derived, in the first place, from Gorges, and in the second place, from the ordinance of 1641.

The grant from the king to Gorges is of "all and singular the soils and grounds thereof, as well dry as covered with waters," "together with the fishing of what kind soever, as well pearls as fish, as whales, sturgeons, or any other, either in the sea or in rivers."

If this grant were considered without the saving clause hereafter to be noticed, it might not be difficult to ascertain its true construction. The grant of fishing is as extensive in the sea as in the rivers. The idea of an exclusive grant to fish in any part of the sea, that must destroy the common right, can not be received. If it be alleged that the grant should be permitted to operate upon the shores, where by law it might, it is to be observed that the whole language of the grant is to be considered for the purpose of ascertaining its true construction. That it is apparent, from an examination of the whole instrument, to have been the intention to transfer from the king to Gorges, within the bounds of the territory granted, the same rights which the king had, either by the *jus privatum* or *jus publicum*. The *jus publicum* he held in trust for the common benefit of the subject. There is no indication of an intention to violate that trust by its transfer to another; and his grantee would take subject to it.

“The *jus privatum* that is acquired to the subject, either by patent or prescription, must not prejudice the *jus publicum* wherewith public rivers and arms of the sea are affected:” Hale’s *De Jure Maris*.

“The king had the right of soil in the shore in general; but the public had the right of way over it, and the king’s grantee can only have it subject to the same right.” Opinion of Mr. Justice Best in case of *Blundell v. Catterall*, 5 Barn. & Ald. 268.

In the case respecting the fishery of the Banne, it appeared that the king had the fishery as parcel of the ancient inheritance of the crown, that he granted the territory where the fishery was with “*omnia castra messuagia, etc., piscaris, piscationes, aquas,*” etc.; and it was held that the fishery of the Banne did not pass by the grant of the land and the general grant of all piscaries; that general words in a grant by the king would not pass such a special royalty: Davis, 55. This case and the construction was approved by the opinion in the case of *Somerset v. Fogwell*, 5 Barn. & Cress. 875.

If such language must be so construed as not to convey a private fishery, which the king might lawfully convey, much less should it be construed in this conveyance so as to impair rights which he held in trust and could not convey discharged of it without a violation of duty. “And it has been frequently held that the king takes this right of soil in trust for the public, so far as the fishery is concerned, and although the king may grant away this right of soil to another, yet his grantee will take it subject to the same trust; and by such grant, however compre-

hensive in its terms, the public, that is, the king's subjects, can not be deprived of their common right:" *Weston v. Sampson*, 8 Cush. 352 [54 Am. Dec. 764]. In the construction of a grant made to the duke of York, of a character very similar to that of the grant to Gorges, the opinion states: "If the right of common fishery for the common people, stated by Hale in the passage before quoted, was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms, and would not have been left for inference from ambiguous language:" *Martin v. Waddell*, 16 Pet. 367. Mr. Justice Thompson, in his dissenting opinion in that case, says: "The sovereign power itself, therefore, can not, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of a common right. It would be a grievance which never could be long borne by a free people." If so, no grant of the sovereign power capable of any other should receive a construction that would destroy or impair any right held in trust for the common benefit of the people.

If, however, there may be doubt respecting the legal construction of the grant to Gorges, when considered without the saving clause, there can be none when that is noticed as part of the instrument. That clause contains these words: "Saving always to all subjects of our kingdom of England liberty of fishing as well in the sea as in the creeks of said province and premises aforesaid, and drying of their fish and drying their nets ashore of the said province and the premises, anything to the contrary thereof notwithstanding." The common right of fishery is thus clearly reserved and preserved for the king's subjects.

It is insisted that although the liberty of fishing in the creeks as well as in the sea may be saved, yet that liberty is restricted to the taking of such fish as may be and are usually dried on the shore. This construction is inadmissible, both upon general rules and upon the use of the language. By general rules, a construction which would allow a grant of the king to diminish a common right is to be rejected, unless it be so clearly and fully expressed as to be incapable of any other reasonable construction. The language respecting the drying of fish and of nets according to its literal and grammatical construction does not restrict the liberty to take all kinds of fish. It saves to his subjects other and further rights than they had by the common law, those of drying their fish and nets "ashore." This saving

of additional rights to them exhibits a general intention not only to preserve to them their common right of fishery, but to afford unusual facilities for its exercise.

The third position presented by the counsel for the defendant asserts "that the grant to Gorges conveys a right to a several fishery in all the waters covering the land conveyed."

A several fishery is an exclusive one. No other person can lawfully fish within its bounds. A construction of the grant which would make it convey such a fishery would not only destroy the whole effect of the saving clause, but it would exclude all the people from fisheries of every description in the sea and tide-waters within the bounds of the territory.

It will not be necessary to offer any examination of the ordinance, or any argument to prove that a title to the shore acquired by it does not destroy the common right of navigation or of fishery. Its construction with reference to the rights of fishery was considered in the case of *Parker v. The Cutler Milldam Co.*, 20 Me. 353 [37 Am. Dec. 56], and no error in it has yet been perceived. If needing support, it may be found in the opinion of the court in the case of *Weston v. Sampson*, 8 Cush. 347 [54 Am. Dec. 764], in which it is said: "It is quite certain, we think, that the mere fact that the *jus privatum* or right of soil was vested in an individual owner does not necessarily exclude the existence of a *jus publicum* or right of fishery in the public." If the title vested in the owner does not necessarily exclude the common right of fishery, that can not be affected by a title to the soil merely; and the ordinance does not attempt to impart any exclusive right of fishery to such owner.

The defendant therefore fails to show that he has acquired, either under the grant to Gorges or under the ordinance, any right of fishing in the premises inconsistent with the common right of all the people.

If this be so, his counsel insists that the common right of fishery does not include the fishery of clams, which are taken out of the soil. In all the treatises respecting that common right, the general term "*piscaria*," or its equivalent, is used as including all fisheries, without any regard to their distinctive character, or to the method of taking the fish. There are many kinds of fishery recognized in them and in judicial decisions; but the general term is uniformly used, not with reference to any one of them, unless that one be particularly named, but as including them all. The fact that the soil between high and low water mark may be dug up or disturbed to take oysters

and clams would have no tendency to prove that they were not included in the general term, for the king held his title to that soil as a *jus publicum* for the common benefit, and the digging upon it in the exercise of a common right would occasion no injury. That shell-fisheries have ever been regarded as a part of the public fisheries of England is further shown by the fact that they have been regulated as such by statutes, in which they are denominated fisheries: the oyster fisheries by 2 Geo. II., c. 19; 31 Geo. III., c. 51; lobster fisheries by 9 Geo. II., c. 33. In like manner have the salmon fishery, the herring fishery, the pilchard fishery, and other fisheries been regulated.

The case of *Bagott v. Orr*, 2 Bos. & Pul. 472, was trespass for taking and carrying away shell-fish and shells in certain closes. The special plea of the defendant alleged that the closes were certain rocks and sands of the sea within the flux and reflux of the tides, that in them every subject had of right the liberty of taking shell-fish and shells. The replication traversed that right. The report states that "the court were of opinion that if the plaintiff had it in his power to abridge the common right of the subject to take sea-fish, he should have replied that matter specially, and that not having done so, the defendant must succeed upon his plea, as far as related to the taking of the fish; but observed that as no authority had been cited to support his claim to take shells, they should pause before they established a general right of that kind."

Although no judgment appears to have been rendered, the opinion of the court respecting the rights of the parties appears to have been fully and clearly stated. Kent, in his Commentaries, refers to the case as so deciding; but in notes in the different editions he says it may be considered as overruled, or as shaken by the case of *Blundell v. Catterall*, 5 Barn. & Ald. 268: 3 Kent's Com. 417. This remark is regarded as erroneous.

The question presented in the case of *Blundell v. Catterall* was, whether the king's subjects had a common right to cross the seashore with bathing-machines to bathe. The decision was against it.

It seems a little extraordinary that a decision denying such a right should be regarded as affecting an opinion that a common right to take shell-fish upon the seashore did exist. Mr. Justice Bayley did not regard the two cases as in conflict. He says: "The case of *Bagott v. Orr* seems to me to conclude nothing on the right in question." After making other remarks upon it, he says: "The claim, therefore, in that case was very different

from the present: it was a claim for something serving to the sustenance of man, not a matter of recreation only; a claim to take, when left by the water, what every subject had an undoubted right to have taken while they remained in the water; and upon that claim there was no regular judgment. But it would by no means follow, because all the king's subjects have a right to fish up fish on the shore, that they have therefore a right to pass over the seashore for the purpose of bathing." The case was noticed by Mr. Justice Best, with approbation. The case of *Bagoll v. Orr* must, therefore, still be regarded as the deliberate and unshaken opinion of the court, after a full and learned argument by distinguished counsel upon the right now in question.

The case of *Seymour v. Courtenay*, 5 Burr. 2814, appears to have been referred to by Mr. Justice Thompson, in his opinion in the case of *Martin v. Waddell*, as unfavorable to such a conclusion.

The action was trespass for disturbing the plaintiff's several fishery, claimed by a grant from Lord Clifford, with the exception of an oystery, and a reservation of a right to take fish for his own table. The question was, whether the exception and reservation destroyed the several fishery. Lord Mansfield, as reported, says: "Here Lord Clifford being the general owner demised to the plaintiffs, reserving a particular species of fishery, viz., the oystery, which in its nature is to be exercised in a particular mode." An oystery is here regarded as a "particular species of fishing," and of course included in the common right of fishery. The case, so far as it has any bearing on the present question, is clearly favorable to the common right, and not opposed to it. For oysters as well as clams are often taken out of the soil by digging.

Mr. Justice Thompson referred also to the case of *Rogers v. Allen*, 1 Camp. 308, for the same purpose. That was an action of trespass for breaking and entering the several oyster fishery of the plaintiff. The special plea of the defendant alleged that the *locus* was in a navigable river and arm of the sea; that all the king's subjects had a right there to fish and dredge for oysters. The plaintiffs did not deny that common right, but in their replication prescribed for a several fishery as appurtenant to the manor of Burnham, and attempted to prove it as existing "in very early times." The defendants attempted to disprove the existence of a several fishery, by showing that all persons who chose had been accustomed to fish there for all sorts of floating

fish. In reply to this, among other remarks, Mr. Justice Heath said: "Part of a fishery may be abandoned and another part of more value may be preserved. In the whole case the fishery for oysters is treated as included and as governed by the laws respecting the common right of fishing, unless withdrawn by a prescription for a several fishery, which may as well be applied to a salmon as to an oyster fishery. The case is therefore favorable to the common right as including shell-fish."

No case has been cited or noticed in the English books in which shell-fish have not been regarded as included in the *communis piscaria* of the kingdom. They are so regarded and spoken of in the opinion of the court in the case of *Martin v. Waddell*.

In the case of *Weston v. Sampson*, the question whether shell-fish, including clams, constituted a part of the common fisheries was very fully considered, and the decision was that they did. This court may therefore well rest upon its former decision to the same effect, in the case of *Parker v. The Cutler Milldam Company*, until further light is obtained.

It is with some surprise that an intimation has been noticed that the case of *Moore v. Griffin*, 22 Me. 850, may in principle be opposed to it. The only question in that case having any relation to the subject was whether "the right to take mussel-bed manure" from the shore of tide-waters was common to every inhabitant of the town. The idea that "mussel-bed manure" could constitute any part of a common fishery was not then and can not now be entertained.

It is insisted in argument, that if a common fishery by which the soil may be disturbed can be established, the owner of the shore will be deprived of all right to erect a wharf or to make improvements upon his own land.

The common right of fishing has always been held and enjoyed in subordination to the right of navigation. Any erection which can be admitted by the latter will not be prevented by the former right.

The remaining ground of defense is, "that he and those under whom he claimed have been accustomed to take clams for a period of sixty years last past, at their free will and pleasure, from the flats described in the plaintiff's declaration."

Such a taking would prove nothing more than a lawful exercise of their common right to do so until they had been precluded by some statute regulation of that common right. Since that time it might amount to a continued violation of a public statute. Every other citizen might, before any statute regula-

tion, lawfully conduct in like manner. No legal defense would be presented by the proof proposed.

Objection is made in defense to the validity of the statute enacted for the regulation of the common right. The right of the plaintiff to have judgment is not, by the report, made to depend upon such a question. It may be desirable, for the purpose of quieting litigation, to express an opinion upon it.

That the state, as representing the people, has the right to regulate such common rights and privileges, has been repeatedly declared by judicial decisions.

If those rights are to be regulated, it may be necessary to place the exercise of them under the superintendence and care of some persons, to make them as valuable or useful as possible, as well as for their preservation. The law may designate persons holding particular official positions as well as others for that purpose, and may prescribe their duties. The fifth section of the act does not deprive any citizen of the right to take clams "for the consumption of himself or family;" or any fisherman of the right to take them for bait for his own use, not exceeding a certain quantity at one time. Those not needed for such uses are not to be taken without a permit from the selectmen or assessors. If they could be taken by all without any limitation of the quantity and for the purpose of sale for profit, the result might be that they would soon be so much diminished or destroyed, that none desirable would be left for the common use for food or for bait. Such control of them may be rather for their protection, and in furtherance of the enjoyment of the common right. If the agents of the law abuse their trust, they may be discharged, and others may be employed.

Defendant defaulted.

HOWARD, RICE, and CUTTING, JJ., concurred.

A dissenting opinion was drawn up by HATHAWAY, J.

PUBLIC RIGHT OF FISHERY IN NAVIGABLE WATERS: See *Weston v. Sampson*, 54 Am. Dec. 764, note 769, where other cases are collected.

RIGHT OF TAKING SHELL-FISH IN NAVIGABLE WATERS: See *Weston v. Sampson*, 54 Am. Dec. 764, note 769, where other cases are collected.

RIGHT TO USE OF NAVIGABLE WATERS IS IN PEOPLE SUCCEEDING TO RIGHTS OF CROWN: See *Moore v. Veazie*, 52 Am. Dec. 655, note 669, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Dyer v. Curtis*, 72 Me. 184, to the point that the property in the flats under the colonial ordinance of 1647 was held subject to the right of navigation and fishery; and in *Commonwealth v. Bailey*, 13 Allen, 544, to the point that no right of property or control over fisheries remained in the towns in their corporate capacity, under the act of 1755.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

MADDOX v. WHITE.

[4 MARYLAND, 72.]

LESSOR MAY BY INJUNCTION PREVENT HIS LESSEE, or those claiming or holding under him, or acting by his authority, from converting the demised premises to uses inconsistent with the terms of the contract, and from making material alterations for such purposes, and committing other kinds of waste.

SUBLESSEE MAY BE RESTRAINED BY INJUNCTION from violating the stipulations in the original lease without making the original lessee a party.

WHEN APPEAL IS TAKEN UPON DEMURRER, the averment in the bill will be taken as true.

INJUNCTION. Appeal from the equity side of Baltimore county court. John White, plaintiff; Charles T. Maddox and Adolph Aur, defendants. Plaintiff leased a portion of a building in Baltimore to James M. Buchanan, postmaster of the same city, for the purpose of a post-office. Maddox succeeded Buchanan as postmaster, and removing the post-office to another part of the city, let the premises to his co-defendant, Aur, for a liquor establishment. Aur began altering the building for his purposes, and the plaintiff prayed an injunction to stay waste. To his bill a demurrer was filed, exhibiting the reasons appearing in the opinion. The demurrer was overruled, and an appeal was taken.

Thomas G. Pratt, for the appellants.

Thomas S. Alexander, for the appellee.

By Court, **ECOLESTON, J.** The bill in this case was filed on the equity side of Baltimore county court, by the appellee against

the appellants. It states that the complainant, as the owner of a building in the city of Baltimore, which for some time had been and still was used as a post-office, on the first day of June, 1848, demised several apartments of the building to James M. Buchanan, then postmaster of the United States for the city of Baltimore; the demise being for the term of four years from the first of July ensuing. That it was stipulated that the premises should be used as the Baltimore post-office; and that at the expiration of the term the premises should be restored to the possession of the complainant, in the order and condition they were when demised, reasonable wear and tear excepted. That in virtue of this contract, Buchanan, as postmaster, entered upon or retained possession of the premises, and continued to use the same for the purposes of a post-office from the first of July, 1848, until some time during the year after, when he resigned or was removed from the office of postmaster, and the defendant Maddox was appointed his successor. Whereupon Maddox, as postmaster, and in virtue thereof assignee of Buchanan, entered upon the premises, and was accepted as tenant of the same by the complainant, and occupied the demised property as a post-office until about the month of August, 1851, at which time Maddox removed the post-office, and placed the premises, or the principal part thereof, in the possession of the defendant Aur, with directions or authority to the said Aur to convert and use the same for the purposes of a beer establishment, or depot for the sale of beer and other fermented liquors. And the bill avers that at the time of filing the same, Aur, claiming as assignee of Maddox, was actually engaged in tearing down partitions and committing other material waste and injury to the property, and making alterations in the arrangement thereof, with a view of fitting it up for the purposes of preparing and selling beer and other fermented liquors; and that he avowed his purpose of establishing and opening a depot or place for sale of such liquors as soon as he could make the necessary alterations. And the complainant insists that by the terms of the agreement the demised premises were to be used as a post-office exclusively, and the appropriation thereof to a different purpose would be a fraud on the agreement; that the alterations proposed to be made would materially injure the property and lessen its value, and directly violate the stipulation requiring the premises to be restored in like order and condition as at the time of the demise; that the conversion thereof to the purposes intended by Aur

would be exceedingly offensive and a nuisance to the complainant and his family, who reside in an adjacent building, and to his tenants occupying parts of the same building; and he apprehended he would lose those tenants, and be compelled to leave the premises occupied by them vacant, or appropriate them to other purposes.

The bill prays for an injunction to restrain the defendants from using the demised property for any other purposes than those of a post-office, and especially from altering or changing the order or condition thereof, by tearing down partitions or other fixtures, or making repairs or erections thereon to fit the same for the purposes of a depot for the manufacture, preparation, or sale of beer or other fermented liquors, or committing other waste or injury to the premises.

An injunction was granted, and then the defendants appeared and filed a demurrer to the bill, assigning for cause of demurrer the following reasons: 1. That the complainant has not stated such a case in his bill as entitles him to the injunction or relief prayed for against the defendants; 2. That if the matters stated entitle the complainant to any relief against the defendants, his remedy is at law, and not in equity; 3. That according to the complainant's own showing, the postmaster general of the United States and the United States should have been made parties.

After argument the court below overruled the demurrer, and ordered the defendants to answer. From this order, and also from the order granting the injunction, this appeal is taken.

Believing the appellee entitled to an affirmance on the merits, we deem it unnecessary to notice the preliminary questions presented on his part, in regard to the regularity of the appeal.

On behalf of the appellants, in relation to the first and second grounds of demurrer, it was contended that there was no privity between the complainant and defendants; but more especially so in reference to the first; that his acts complained of were those of a stranger and mere trespasser, which would not authorize the interposition of a court of equity by an injunction; but if the complainant was entitled to relief, his remedy could only be at law. It was conceded by the appellant's counsel that a landlord, by injunction, could restrain injuries to his property, committed or about to be committed by his tenant, when for similar acts by a stranger he could not have such relief.

That a lessor may, by injunction, prevent his lessee, or those claiming or holding under him, or acting by his authority,

from converting the demised premises to uses inconsistent with the terms of the contract, and from making material alterations for such purposes, as also from committing other kinds of waste, will be found fully sustained by *Barret v. Blagrove*, 5 Ves. 555; *Douglass v. Wiggins*, 1 Johns. Ch. 435; *Steward v. Winters*, 4 Sandf. Ch. 587; which authorities are referred to by the court below. See also Eden on Injunctions, 377, 378; 2 Story's Eq. Jur., sec. 913.

As this case comes before us upon demurrer, we are to consider all the averments in the bill as true. And under the allegations therein contained, in connection with the exhibit therewith filed, we can not consider either of the defendants as a stranger and mere trespasser, in the view insisted upon by appellants, but we agree with the county court in thinking the principles established in the authorities referred to are applicable to this case.

Nor was there any error in overruling the third objection presented by the demurrer. The United States and the postmaster general were not necessary parties. No injury was done to the complainant by them or either of them which it was important for him to restrain by the injunction, nor had he any ground on which to ask relief against them. In the case of *Barret v. Blagrove*, 5 Ves. 555, a sublessee, or rather his wife during his insanity, was violating a stipulation contained in the original lease, which the lord chancellor restrained by injunction. The bill did not make the original lessees parties, but the sublessee and his wife were the only defendants.

The orders of the county court will be affirmed, with costs to the appellee, and a decree will be signed to that effect, and remanding the cause for further proceedings.

Orders affirmed, and cause remanded.

INJUNCTION TO PREVENT IMPROPER USE OF LEASED PREMISES.—The preventive jurisdiction of equity by injunction is frequently invoked between landlord and tenant for the better protection of their relative rights in the demised premises. As to what will constitute an improper use of leased premises depends greatly upon the covenants expressed in the lease. The subject of waste is so closely allied to improper use that it is with difficulty that a distinguishing line can be drawn. When the subject is examined carefully, it will be found that the term "waste" embodies improper use. An examination of the authorities bearing upon this branch of the subject discloses a somewhat liberal exercise of the jurisdiction for the prevention of waste by the tenant in cases where the legal remedies are inadequate to the proper protection of the rights of the landlord. It is sufficient to say in general terms that whenever, under the terms of a lease, the lessee is re-

stricted to the use of the demised premises in a particular manner or for a specified purpose, a violation of the covenant by the use of the premises in a different manner or for another purpose affords ground for the interposition of equity by injunction. And in all such cases a court of equity is regarded as the appropriate forum for administering relief, the jurisdiction being based in part upon principles analogous to those which govern the equitable remedy of specific performance, and in part upon the necessity of preventing a constantly recurring grievance resulting from the continuous breach of the covenant, which can not be adequately compensated by an action for damages: Taylor's L. & T. 691; High on Inj., sec. 1143; Kerr on Inj. 86. The following cases are given as illustrations where equity has afforded relief by enjoining the tenant from an improper use of the demised premises. The tillage of farming lands contrary to the established rotation of crops, and contrary to the established usage of that part of the country, may be enjoined, the tillage being contrary to good husbandry and depreciating the value of the premises: *Wilds v. Layton*, 12 Am. Dec. 91. Acts contrary to the obligation of a tenant to deal with the premises according to the custom of the country or express agreement are not, properly speaking, acts of waste, unless they are also breaches of the common law; but being of a like mischief with acts of waste, they are restrained upon somewhat similar principles: *Longhurst v. Dixey*, Toth. 255; *Kimpton v. Eve*, 2 Ves. & B. 352. In restraining acts of this character, the court proceeds upon the ground of irreparable damage: *Lambert v. Lambert*, 2 I. Eq. Rep. 210; *Doran v. Carroll*, 11 I. Ch. Rep. 379; *Attorney General v. Sheffield Gas Co.*, 3 De G. M. & G. 321; and that where a positive stipulation has been entered into between the parties, either party has a right to insist upon its literal performance by the other, irrespective of the question of damage: *Kemp v. Sober*, 1 Sim., N. S., 520; *Tipping v. Eckersley*, 2 Kay & J. 264. The lessee is restricted to a particular use of the demised premises, and will be restrained from any other use of them: *Frank v. Brunneman*, 8 W. Va. 462. So where the lessee leased premises, covenanting that they should not be used for any purpose extra-hazardous on account of fire, and that the lessee should not sublet, and both covenants were broken, an injunction was granted, the court holding that the infraction of either covenant was a ground for relief: *Gillilan v. Norton*, 6 Robt. 546. So where a tenant proceeded to pull down and remove a brick building on the premises: *Jungerman v. Bovee*, 19 Cal. 354; for altering the front of a building and putting in a side door: *Baughner v. Crane*, 27 Md. 36; for pulling down a house and building another which the landlord objects to: *Smith v. Carter*, 18 Beav. 78; or from making material alterations in a dwelling-house, as by changing it into a shop or warehouse: *Douglass v. Wiggins*, 1 Johns. Ch. 435; 2 Story's Eq. Jur., sec. 913; or from throwing down inclosures, or pulling down houses: *Mayor etc. of London v. Hedger*, 18 Ves. 355; *Hindley v. Emery*, L. R., 1 Eq., 52; for breaking up a meadow for the purpose of building: *Wilton v. Saxon*, 6 Ves. 106; for altering a fish-pond: *Bathurst v. Burden*, 2 Bro. C. C. 64; for defacing seats: *Williams v. Day*, 2 Ch. Cas. 32; for heating or polluting water so as to injure the demised premises: *Nicholson v. Rose*, 4 De G. & J. 10; for sowing the land with mustard seed, or threatening to do so: *Pratt v. Brett*, 2 Mad. Ch. 62.

An injunction was granted also in the following cases: Where the lessees of a bridge permitted parties to use it in a manner contrary to the terms of the lease: *Niagara Bridge Co. v. Great Western R. R. Co.*, 39 Barb. 212; where the lessee, a druggist, with notice that the landlord will not let the premises for a bar-room, agrees to let for that purpose: *Parkham v. Aicardi*,

24 Ala. 393; where a lessee covenanted to use a house for private purposes, and began preparations for conducting a coach-making business: *Bonnett v. Sadler*, 14 Ves. 526; where a lessee covenanted to conduct a regular dry-goods business, and did an auction dry-goods business instead: *Steward v. Winters*, 4 Sandf. Ch. 587; where the lessee of a house covenanted not to carry on any business or trade, and attempted to set up a school: *Kemp v. Sober*, 1 Sim., N. S., 520; *Johnstone v. Hull*, 2 Kay & J. 423. So where parties entered into covenants of like character, they were restrained from carrying on the trade or business of a baker and confectioner: *Hodson v. Coppard*, 29 Beav. 4; hair-dresser: *Clements v. Welles*, L. R., 1 Eq., 200; auctioneer: *Parker v. Whyte*, 1 Hem. & M. 167; butcher: *Doe v. Spry*, 1 Barn. & Ald. 617; keeping beer-shop and spirituous liquors: *Feilden v. Slater*, L. R., 7 Eq., 523; *Barrow v. Richard*, 8 Paige, 357; *Seymour v. McDonald*, 4 Sandf. Ch. 503; soap-boiling: *Clements v. Welles*, *supra*. Where a tenant for life converted, or tried to convert, agricultural land into a cemetery, an injunction was granted: *Hunt v. Browne*, Sau. & Sc. 178; *Cregan v. Cullen*, 16 I. Ch. Rep. 339. An injunction was granted where the tenant attempted to remove dung and soil from the demised premises: *Bonnell v. Allen*, 53 Ind. 130; *Pulteney v. Shelton*, 6 Ves. 147; *Onslow v. ———*, 16 Id. 173; and it was also granted in a number of instances where the premises were used for a dairy-farm. See *Middlebrook v. Corwin*, 15 Wend. 169; *Lewis v. Lyman*, 22 Pick. 437; *Lewis v. Jones*, 17 Pa. St. 262; *Daniels v. Pond*, 21 Pick. 367; *Sawyer v. Twiss*, 26 N. H. 345; but when the manure is made from provender obtained from other sources than the farm, an injunction will not lie: *Gallagher v. Shipley*, 24 Md. 427. A lessee is as much entitled to stay waste by his under lessee as if he had an estate of inheritance: *Farrant v. Lovell*, 3 Atk. 72. So a receiver may have an injunction to restrain the tenants or under-tenants from committing waste: *Mason v. Mason*, Flan. & K. 429; *Dorman v. Dorman*, 3 I. Eq. Rep. 385; or using the premises to the detriment of the owners: *Parkham v. Aicardi*, 34 Ala. 393; *Beckwith v. Howard*, 6 R. I. 1.

THE PRINCIPAL CASE WAS EXPLAINED and relied on as authority in the case of *Baugh v. Crane*, 27 Md. 42, and which is referred to in the note, *supra*.

BALTIMORE & SUSQUEHANNA R. R. Co. v. WOODRUFF.

[4 MARYLAND, 242.]

INSTRUCTION ASSUMING THAT PROPERTY WAS DAMAGED in the manner complained of is defective, notwithstanding the proof established the fact beyond a reasonable doubt.

OFFERING OF IMPROPER EVIDENCE BY ONE PARTY can never justify the introduction of similar evidence by the other party; irrelevant testimony can not be admitted as an answer to irrelevant testimony.

TERM "NEGLIGENCE" HAS DIFFERENT MEANINGS in relation to different causes of action. In some cases, it means a very slight absence of care and prudence; in others, the absence of reasonable care; and again, such want of care as makes gross negligence.

DEGREE OF NEGLIGENCE REQUISITE TO RENDER RAILROAD COMPANY LIABLE in damages for fire occasioned by its locomotives to property on the line of the road is that which arises from a want of reasonable care and diligence, and not that arising from the absence of the slightest or least care or caution.

TERM "REASONABLE CARE AND DILIGENCE," as applied to fires on line of railroad caused by engines running on the same, means having engines, properly constructed, in good order, with suitable fixtures for preventing injuries by fire; the spark-catchers, such as are known to the company to have been used and approved of, and best calculated to prevent the emission of sparks, while allowing sufficient draft to create steam enough to propel the engine at proper speed; and such care and diligence in using the locomotive upon the road as would be exercised by skillful, prudent, and discreet persons having control of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road.

MARYLAND RAILROAD ACT OF 1838 CONSTRUED.

BILL OF EXCEPTIONS SEALED BUT UNSIGNED by the court is not defective when it is followed by a second bill regularly signed and sealed, and referring to the subject-matter contained in the unsigned bill.

CASE. Appeal from Baltimore county court. Albert P. Woodruff, plaintiff; Baltimore and Susquehanna Railroad Company, defendants. Action brought to recover damages for injuries caused by fire to plaintiff's property by defendants' locomotives. Plaintiff proved that two fires occurred on his farm, through which the road passed; that the spark-catcher used was not the safest and best, but a modification of it; and that previous to the fire on plaintiff's premises a number of fires occurred on other persons' property through the same agency. Defendants objected to the admission of the evidence relating to the fires, but the objection was overruled. The exception was noted, a scroll made for a seal, but no signature by the court. The other exception is stated in the opinion. Plaintiff asked for certain instructions, which were granted. These appear in the opinion. There was a verdict for the plaintiff, and the defendants appealed.

St. George W. Teackle, for the plaintiff and appellee.

Coleman Yellott and J. Mason Campbell, for the defendants and appellants.

By Court, **ECLESTON, J.** The first bill of exceptions in this case concludes in the usual form, and has a scroll for a seal, but is not signed by the judge. This, the appellee contends, renders it so defective that the decision of the court below, in regard to the admission of the evidence objected to, is not properly before us for revision. Nevertheless, he insists that in considering the prayers contained in the second exception, we are authorized to look at the testimony set forth in the first, because the second begins by saying: "The plaintiff and defendant then,

to sustain the issues on either side respectively, offered the evidence given by each, and set out in the first bill of exception."

The argument on the part of the appellant assumes that the first bill of exceptions is perfect in itself, as it has a seal, although not signed by the judge; but if this be not true, any defect arising from the want of the judge's signature is cured by the language of the subsequent exception, which is regularly signed and sealed. The appellant insists further, that if the defect contended for by the appellee can avail to prevent a revision of the point presented in the first exception, this court can not look at the testimony contained in it for any purpose. If void in reference to the question decided by the court, it is void as a bill of exceptions in every respect, which would leave the case entirely without testimony to sustain the plaintiff's prayers, and consequently a reversal must follow.

But we need not stop to inquire which of these positions is correct; for whether the first exception is in the case or out of it, the judgment below must be reversed, on account of error in both the prayers of the plaintiff.

The first prayer begins thus: "If the jury shall believe from the evidence that the damage to the trees, fences, grass, etc., of the plaintiff was occasioned by fire communicated from the engines of or by the agent or agents of the defendant," etc. In this it is assumed that damage was done to the trees, etc., of the plaintiff, and the jury are only left to inquire whether such damage to the trees, etc., of the plaintiff was occasioned by fire. This assumption on the part of the court was an interference with the province of the jury, who possessed the exclusive right of deciding upon the proof whether any damage had been done to the property of the plaintiff. In *Gaither v. Martin*, 3 Md. 162, this court said: "No matter how clear and satisfactory the proof was to establish the sale, the court could not assume that it took place, as it would be an invasion of the rights of the jury." See also *Crawford v. Berry*, 6 Gill & J. 71; *Brooks v. Elgin*, 6 Gill, 259; *Okisko Co. v. Matthews*, 3 Md. 176, and the cases there cited. These authorities establish very clearly that this prayer must be considered erroneous, even if the proof established the fact beyond controversy that the plaintiff's property was damaged in the manner complained of. It is therefore of no importance in reference to this matter whether the testimony set out in the record is legitimately before us or not. In either alternative the result would be the same.

The second prayer of the plaintiff is subject to the same ob-

jection. Indeed, its beginning is in the very language of the first, except using the word "caused" instead of "occasioned."

As this case must go back for a second trial, we will express our views upon the questions presented in the record as if they were regularly before us, unaffected by any objection to the first bill of exceptions.

The fire complained of took place in the spring of 1845. After all the testimony in the cause had been given, except that which constitutes the point of the first exception, the plaintiff offered to prove "that before the occurrence of the fires upon the plaintiff's farm, as given in evidence, fire had been communicated by the defendants' engine to the property of other persons on said road, and that it had been burned in consequence of such fire." This proof was objected to, but the court permitted it to be given.

It is said this evidence was proper for the purpose of authorizing the jury to believe that if the engine of the company created the fires offered to be proved, it also occasioned the one in controversy. And if not admissible with that view, it was so for the purpose of rebutting the proof given by the defendant to show care and diligence.

The point in controversy or in issue was, whether the property of the plaintiff was fired by the engine of the defendant by negligence: the plaintiff being required only to prove the firing; the defendant to show the want or absence of negligence.

The books are full of cases showing how careful the courts have been to refuse the admission of collateral matters in evidence. And this refusal is founded upon principles of sound reasoning. Collateral facts are calculated to introduce a wide scope of controversy, drawing off the mind of the jury from the point really in issue, and the adverse party not having notice before the trial that such evidence is to be produced, can not be prepared to rebut it: See 1 Greenl. Ev., sec. 52. In this section, and in the authorities cited below, cases will be found where this species of proof was rejected, when the facts offered to be introduced were quite as pertinent to the issue as in the present instance: 3 Phill. Ev. 443, 444, Cowen & Hill's note, 330; *Pennsylvania etc. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 311, 313, 314.

It is by no means a necessary consequence that because the engine did set fire to the property of another it also was the cause of burning that of the plaintiff. The only legitimate inference from the former fire would be to show that a locomotive

engine running upon a railroad is an instrument which can and probably will set fire to property along the road. The very nature of such an engine is sufficient to satisfy a jury of that fact. And if the jury are to be considered as knowing nothing on the subject without proof, the appropriate testimony would be to describe the construction of the engine, the means of propelling it, and the manner in which it throws out sparks of fire when in motion.

The evidence offered is no less objectionable in reference to the question of negligence than to that of the firing itself. There is no time specified. We do not know whether it was one month or five years before the injury in dispute. And the instances alluded to might have occurred without the least negligence, which the defendant would have been able to show by satisfactory proof, if notified of an intention to introduce them. Or if they had been the result of great carelessness, nevertheless the injury complained of in this suit might have occurred when the agents of the company were using all proper precaution. For it can not be denied that such an engine may communicate fire when running in the best condition.

But the plaintiff argues that the proof of the defendant on the subject of care and caution is so loose and indefinite as to render it illegal, and therefore the evidence objected to was proper as rebutting proof. Admitting he is right as to the defendant's testimony, still his was not admissible. In *Walkup v. Pratt*, 5 Har. & J. 56, the court held that "if the counsel for the appellee had offered improper evidence, the court, on application, would have rejected it, but the offering improper evidence by one of the litigant parties never can justify the introduction of similar evidence by the other party; such doctrine would lead to endless confusion, and destroy all the established rules of evidence." And in *Stringer v. Young*, 8 Pet. 336, 337, it was decided that irrelevant testimony would not be admitted as an answer to irrelevant testimony.

In the argument upon the prayers in the second bill of exceptions the plaintiff endeavored to sustain the court below under the provisions of the acts of 1837, c. 309, and 1838, c. 244. The defendant's counsel insisted that the act of 1837 was unconstitutional; and if not, that it was repealed by the act of 1838. They also contended that this is an action at common law, and not under the statute, and therefore the rules of the common law are only applicable to it, the provisions of neither statute having any influence on the questions involved in the

controversy. If mistaken in this view, they claim that the last act is the only one to be considered as having any bearing on the case, and under that they are entitled to a reversal.

The act of 1837 was intended to make a railroad company responsible in damages for property injured by fire, caused by an engine on the road, whether there was negligence or not. The act of 1838 provides that the company shall pay damages for injuries by fire, "unless said company can prove to the satisfaction of the justice, magistrate's court, or other tribunal before which said suit may be tried, that the injury complained of has been committed without any negligence on the part of said company or their agents."

Whether the first of these acts is unconstitutional or not is a matter of no importance on the present occasion. In regard to negligence, the last act is certainly inconsistent with the first, and therefore repeals it in that respect. The legislature deeming the first too severe and rigorous, thought proper again to make the absence of negligence a defense, and for that purpose passed the act of 1838. In doing which, we think they have restored the rules of the common law in relation to negligence, except only releasing the plaintiff from the obligation to prove it, and casting the *onus* of proving its absence upon the defendant. This, however, is denied by the plaintiff. He thinks because the act requires a defendant to prove the injury was done "without any negligence," the common-law rules on the subject are not now to guide us; but a successful defense can not be made except by showing there was not the least degree of negligence, or in other words, that the utmost care and caution were used. He relies much upon the word "any" as sustaining his view. But we must recollect that this word "negligence" has very different meanings in relation to different causes of action known to the law. In some cases, it means a very slight absence of care and prudence; in others, the absence of reasonable care or caution; and again, such a want of care as makes gross negligence. When, therefore, this word is used in the statute in order to ascertain its appropriate meaning, we should look at the class of cases to which it has reference. In doing this, we shall find by the authorities that in suits similar in character to the present the degree of negligence which is requisite to render a party liable in damages is that which results from a want of reasonable care and diligence, and not that arising from an absence of the slightest or least care and caution. Under such a rule of construction the words "without any neg-

ligence" must mean without any negligence occasioned by the want of reasonable care.

If this be so, it follows necessarily that the second prayer of the plaintiff is erroneous in assuming it to be necessary for the defendant to prove that at the time of the fire the agents of the company acted with the utmost prudence, care, and caution, and that if the disaster in question was occasioned by the least negligence, or want of care or caution, the defendant is liable in this action. It would be difficult to frame more stringent rules than are to be found in this prayer, and we think them such as the law will not justify. The prayer is also defective in requiring the company should show that when the fires took place the engines were propelled by the use of that fuel then in use for such purpose in the city of Baltimore least likely to communicate fire to property along the road. The proof on this subject is, that in the city of Baltimore, on the Baltimore and Ohio railroad, bituminous coal was used as an experiment, but wood was in use on the Philadelphia, Wilmington, and Baltimore railroad, and the Baltimore and Washington railroad; and on the southern railroads they used wood, not coal. The plaintiff having proved that the coal made fewer sparks than wood, and was less calculated to communicate fire, the prayer must necessarily have led the jury to conclude that the defendant was obliged to use coal. They were not left to the inquiry whether wood was in ordinary use upon railroads, or whether coal had been used and found appropriate and suitable for such purposes; but they were told that to be exonerated from damages the defendant must prove the engines were propelled by the use of the fuel then in use in the city of Baltimore least likely to communicate fire.

In using the expression "reasonable care and diligence," we mean having engines properly constructed and in good order, with suitable fixtures for preventing injuries by fire; the spark-catchers such as are known to the company to have been used and approved of, and such as are best calculated to prevent the emission of sparks, allowing at the same time a sufficient draft upon the fire to create steam enough for the purpose of propelling the engine at a proper speed. And we mean also such care and diligence in using the locomotive upon the road as would be exercised by skillful, prudent, and discreet persons, having the control and management of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road. In regard to this subject, we

would refer to the judicious remarks of Chief Justice Shaw, in *Bradley v. Boston and Maine Railroad*, 2 Cush. 541, 542. This authority is cited simply as to the degree of negligence sufficient in such cases to render a defendant liable.

The reasoning contained in the preceding part of this opinion brings us to the conclusion that the second and third prayers of the defendant ought to have been granted. The second asserts the position that the plaintiff could not recover if the jury were satisfied "the fire was communicated without negligence on the part of the defendant." The third contains the proposition that there was no negligence on the part of the defendant, if the usual and proper precautions were taken to prevent, as far as practicable, the communication of fire from the locomotive. If, according to the second prayer, the fire occurred "without negligence," there surely was no liability on the part of the defendant. And if, in the language of the third prayer, to prevent as far as practicable the communication of fire from the engine, the company took the usual and proper precautions, how could the defendant be responsible in damages? The language is not simply the usual precautions to prevent the fire, but the usual and proper precautions to prevent it as far as practicable.

These prayers have been resisted by the plaintiff, not only by asserting the legal propositions they contain to be erroneous, but because there was no evidence to show a want of negligence. The first objection has already been disposed of. In regard to the last, we think there is some evidence tending to prove care and diligence; whether it was sufficiently strong to satisfy the jury that there was no negligence we are not now called upon to decide.

Although it may seem to be somewhat out of the proper order of things to go back to the first prayer of the plaintiff after having discussed the subsequent parts of the case, nevertheless it is necessary for us to do so on the present occasion.

The point intended to be presented in that prayer is, that the damage by fire is *prima facie* evidence of carelessness or negligence on the part of the defendant, and that the defendant must prove there was not such carelessness or negligence, otherwise the plaintiff is entitled to recover.

The defendant admits this to be a correct view of the law under the act of 1838; but it is insisted that the declaration is not under this act, and as it charges negligence in the common-law form, the plaintiff is bound to establish it by proof, and can not

rely upon any legal inference of its existence arising from proof of the fire itself. To this we can not yield our assent. The statute does not give any new cause of action, nor does it give a new action to recover damages for an injury known to the common law. It simply changes a rule of evidence by releasing the plaintiff from proving negligence, if the fact of the fire is established, and casts the *onus* upon the defendant of showing there was no negligence, or in other words, that there was proper diligence. By this, when the fire is proved, the law raises the presumption of negligence, and therefore the charge of negligence in the *narr.* is proved by showing that the fire was occasioned by the defendant. In an action for a libel or in slander, malice is a necessary ingredient; and Starkie, in his work on slander, at margin page 433 of the first volume, considers it necessary to a complete declaration that it should contain an allegation of malice, and the books of forms are in accordance with Starkie. In his second volume, margin pages 52 and 53, it will be seen that in some cases of slander malice is a legal inference from the words spoken, and in such instances it is unnecessary to give evidence of malice in fact or actual malice, unless it may be to aggravate the damages.

We have said there was error in the beginning of the plaintiff's first prayer, in assuming what should have been submitted to the jury. But for this error the prayer would have been correct, according to the view we have expressed in regard to the legal proposition intended to be presented by the instruction asked for.

We are relieved from considering the fourth prayer of the defendant, as it has been abandoned.

Judgment reversed and *procedendo* awarded.

INSTRUCTIONS ASSUMING FACTS which can not be fairly inferred from the evidence should be refused: *Haines v. Stauffer*, 54 Am. Dec. 493; *Wilson v. Huston*, Id. 138; *Melledge v. Boston Iron Co.*, 51 Id. 59, and notes.

EVIDENCE, RELEVANCY AND MATERIALITY OF.—Evidence apparently unconnected with the issue should be rejected: *Crenshaw v. Davenport*, 41 Am. Dec. 56; *Budd v. Brooke*, 43 Id. 321; *Swamscot Machine Co. v. Walker*, 55 Id. 172; *Lawson v. State*, 56 Id. 182.

EVIDENCE NECESSARY TO PROVE NEGLIGENCE OF RAILROAD COMPANY when fire is communicated by locomotive to other property: See *Burroughs v. Housatonic R. R. Co.*, 38 Am. Dec. 64, and note to the same, where the subject is treated at length.

THE PRINCIPAL CASE WAS REFERRED TO in *Coughlan v. Baltimore & Ohio R. R. Co.*, 24 Md. 103; and approved and followed in *Baltimore & Ohio R. R. Co. v. Dorsey*, 37 Id. 25, and *Annapolis & Elkridge R. R. Co. v. Gantt*, 39 Id. 137.

JONES v. HORSEY.

[4 MARYLAND, 306.]

FOREIGN CREDITOR UNITING WITH DOMESTIC CREDITOR in recommending a trustee for insolvent debtor places both creditors upon the same level, and both share alike in the assets.

FOREIGN CREDITORS' ATTORNEY may unite with domestic creditors in recommending a trustee for an insolvent, and in the absence of proof to the contrary, such act will be presumed to be the act of his client.

ATTORNEY HAVING CHARGE OF CLAIM MAY TRANSFER It from the action and decision of such judges as the client has selected in the first instance and submit it to other persons. In such a case the legal presumption is that in so doing he acted by authority of his client.

ATTACHMENT. Appeal from Baltimore county court. George Jones and S. W. Waterbury, plaintiffs; Outerbridge Horsey, garnishee of B. F. Wiggins & Co., defendant. Plaintiffs, who were citizens of New York, based their claim on a judgment recovered against Wiggins & Co. in the United States circuit court, and claimed that the garnishee held certain funds which he had received as trustee of Wiggins & Co. The garnishee pleaded *non assumpsit* for the defendants, and *nulla bona* in his hands. He proved that Wiggins was discharged under the insolvent act, and claimed that prior thereto a paper worded as follows: "To the commissioners of insolvent debtors of Baltimore: The undersigned creditors of B. F. Wiggins, an insolvent debtor, beg leave to recommend Outerbridge Horsey as permanent trustee of said Wiggins. Brent & Horsey, for Jones and Waterbury, \$550. Test—Philip J. Tracy, jun.," which he introduced as evidence, disbarred plaintiffs from recovery. There was a judgment for the defendant, and plaintiffs appealed.

Levin Gale, for the plaintiffs and appellants.

D. C. H. Emory, for the defendant and appellee.

By Court, Eccleston, J. The counsel for the appellants contends that the recommendation of O. Horsey, as the permanent trustee of Wiggins, even if the recommendation had been made by the plaintiffs in person, was not such a recognition of or assent to the proceedings in insolvency as could deprive them of their right to attach the fund in controversy, they being foreign creditors. He assumes "that nothing short of taking a dividend under the insolvent laws can so bring a foreign creditor under the operation of such laws as to affect his debt." In this we think he is certainly mistaken. He refers to *Van*

Hook v. Whitlock, 26 Wend. 43 [37 Am. Dec. 246]; *McCarty v. Gibson*, 5 Gratt. 307; *Norton v. Cook*, 9 Conn. 314 [23 Am. Dec. 342]; and *Phillips v. Allan*, 8 Barn. & Cress. 477, as sustaining his view of the subject. But in neither of these cases was there an act on the part of the creditor which could be construed into an assent to the proceeding; on the contrary, in each case the creditor opposed the discharge of the applicant and did nothing else, so far as the reports inform us.

In *Clay v. Smith*, 3 Pet. 411, the creditor received a dividend of the insolvent's assets, and that was held to be such an assent to the insolvent laws of the state as amounted to an abandonment of the extraterritorial immunity of the foreign creditor. And this is a leading case, which has since been referred to in various decisions. But we have never understood it was supposed to establish the doctrine that nothing less than the actual receipt of a portion of the assets could have a similar effect upon the creditor's claim.

The effect of an insolvent's discharge being under consideration in *Van Raugh v. Van Arsdaln*, 3 Cai. 155 [2 Am. Dec. 259], Chancellor Kent, in giving the decision of the court, declined expressing any opinion as to the operation of such a discharge, provided the case had been presented in either of several enumerated aspects, among which are, "if the plaintiff had given his assent to the proceedings under the insolvent law, or accepted any dividend of the defendant's estate." It is very true the learned chancellor does not here decide what would be the effect either of assenting to the proceedings or of taking a dividend; but it is equally true he seems to consider these alternatives as standing upon equal grounds; and at all events, we can not believe he entertained the opinion that receiving a portion of the estate was the only acquiescence in the proceedings which could take from a foreign claimant his rights, as such, in opposition to the discharge. There is no necessity, however, to rely upon the inference to be drawn from this language of Chancellor Kent, for a decision of the present distinguished chief justice of the United States, in *White, Warner & Co. v. Winn & Ross*, establishes clearly that the rights of a foreign creditor, in opposition to the discharge of an insolvent and in preference to the claims of domestic creditors, may be lost by other means than taking a dividend of the assets. This decision may be found in *Kettlewell v. Stewart*, 8 Gill, 499, and is also mentioned in *Evans v. Sprigg*, 2 Md. 468. In the case alluded to, an attempt was made in behalf of the plaintiffs

(who were foreign creditors), in an attachment laid in the hands of the trustees of an insolvent, to set aside a deed as fraudulent under the statute of 13 Elizabeth. In the progress of the cause the court were satisfied that under the English statute, and independently of our insolvent laws, the deed was valid. And the court put the plaintiffs in the predicament of being obliged to decide whether they would submit to a nonsuit in consequence of the validity of the deed, if they intended to deny the validity of the proceedings in insolvency; or whether they would insist upon avoiding the deed under our insolvent laws. By adopting the latter alternative, they could claim under the permanent trustee such interest only as the insolvent laws would award them; so that they were forced to elect between a nonsuit or taking a dividend of the fund in the hands of the trustees. This, it will be seen, was not a proceeding in a state court having jurisdiction over cases of insolvency, but in the circuit court of the United States. And there the foreign creditors were held bound to submit to the effect and influence of our insolvent system, if they claimed the benefit of that system for the purpose of invalidating a deed which otherwise would have defeated their entire claim, so far, at least, as the property included in that deed was concerned. Voluntarily calling in aid the insolvent laws to avoid the deed otherwise valid, is then such an acquiescence in those laws as places a foreign creditor upon the same level with domestic creditors, and compels him to take a dividend of the assets as they do. We see no just reason why voluntarily coming forward and uniting in the recommendation of a trustee, especially when that trustee is the attorney of the claimant, should not produce a similar effect.

Admitting this conclusion to be correct, the appellants' counsel insists that the recommendation of the trustee in the present case being the act of the attorneys and not of the parties, they can not be affected by it. The authorities cited in support of this position do not, in our opinion, establish the principle contended for. They are, in relation to the inquiry, whether an attorney can enter a *retraxit*, or can release or compromise his client's claim. But this is neither a *retraxit*, a release, nor a compromise.

In *Holker v. Parker*, 7 Cranch, 449, it was contended that an attorney could not, without the consent of his client, transfer a cause to other judges than those appointed by law, and place it before a tribunal distinct from the one before which the party himself had chosen to place it. But the supreme court, in the

opinion delivered by the chief justice, denied the correctness of the position, and held "it to be the practice throughout the Union for suits to be referred, by consent of counsel, without special authority." And in *The Alexandria Canal v. Swann*, 5 How. 89, a question arose whether the reference was authorized by the corporation in the manner or by the persons having the right to do so. The court would not inquire what members of the corporation had the power to direct the proceedings in the suit and assent to the reference. And they say: "The corporation, however governed in this particular, was the party defendant in court and was represented by its counsel, and his acts are presumed to be authorized by the party in conducting the suit. This has long been the settled law of Maryland, which is the law of Washington county."

From those two cases it is perfectly plain that an attorney having charge of a claim may transfer it from the action and decision of such judges as the client has selected in the first instance, and submit it to the decision of other persons. And in the absence of proof to the contrary, the legal presumption is that in so doing the attorney acted by the authority of the client.

It is admitted here that when Messrs. Brent and Horsey signed the recommendation they were attorneys of the plaintiffs for the prosecution of their claim. And we find no proof in the record of any restriction or limitation upon their authority.

The case of *White, Warner & Co. v. Winn & Ross* shows there may be instances in which it would be exceedingly beneficial to a foreign creditor that his attorney, on the spot, attending to the management of his claims, should be clothed with power to acquiesce in the proceedings in insolvency. It has not been and we do not presume it will be seriously contended that, if from assenting to the insolvent laws by an attorney the interest of the client would be promoted, the assent would not then be valid and binding. If binding in such a case, there would be great injustice in holding that the result of the matter is the only test of the validity of the act, in regard to its influence on the client. If, in the beginning, the effect on the claim should be uncertain, but in the end prejudicial, the client would have the full benefit of the experiment, without its having any injurious influence upon his extraterritorial rights. The law as it now stands in regard to those rights is exceedingly hard and oppressive upon the claims of domestic creditors, and we feel no inclination to increase the hardship.

The commissioners in insolvency, under the laws relating to the city of Baltimore, were legally authorized to perform acts having a material bearing and effect in the settlement and final adjustment of claims against the estate of insolvents. Perhaps few, if any, of their acts were more important, as regards creditors, than the selection of trustees. Beyond the limits of Baltimore city, the county courts, in regular session, had the power to appoint trustees where the insolvents made application to the court. In the recess, a judge of the county court or orphans' court could make the appointment.

By the selection of an active and thoroughly competent person, the assets might be much increased beyond what they would be under the management of a man of the opposite character, and it might very well happen that a foreign creditor, by taking a dividend from the efficient trustee, would actually receive a larger share of his claim than he could get by means of an attachment laid in the hands of a trustee regardless of his duty or incompetent to perform it. And this is a good reason why an attorney should have the authority, at his discretion, when not prohibited by his client, to unite in the recommendation of a trustee. If such an act is within the limits of his authority (which we think is the case), then, when done, it is presumed to be with the approbation of his client, unless proof to the contrary is given. Therefore, the recommendation before us must be considered as having the same effect upon the appellants as if it had been their own act: See the cases of *Henck v. Todhunter*, 7 Har. & J. 275 [16 Am. Dec. 300], and *Kent v. Ricards*, 3 Md. Ch. 392.

Approving the decision of the court below on both prayers, the judgment will be affirmed.

Judgment affirmed.

THE PRINCIPAL CASE WAS APPROVED in *Loney v. Bailey*, 45 Md. 450.

VROOMAN v. MCKAIG.

[4 MARYLAND, 450.]

TENANT CAN NOT QUESTION HIS LANDLORD'S TITLE.

IN ACTION FOR MONEY HAD AND RECEIVED, plaintiff can recover any money in the hands of defendant which *ex æquo et bono* belongs to the plaintiff.

TENANT FROM YEAR TO YEAR, holding over without any new stipulations between the parties, impliedly holds subject to all the covenants in his expired contract or lease.

ASSUMPSIT. Appeal from the circuit court of Allegany county. Mary A. Vrooman, plaintiff; Thomas J. McKaig, defendant. Action brought to recover money paid to defendant for the use of the plaintiff, for the rent of a certain house and lot for two years. The plea was *non assumpsit*. Defendant obtained judgment, and plaintiff appealed. The grounds for which an appeal was laid are stated in the opinion.

J. H. Gordon, for the plaintiff.

Thomas J. McKaig, for the defendant.

By Court, LE GRAND, C. J. This is an action of *indebitatus assumpsit*. The appellant, who was the plaintiff in the court below, proved that an action of ejectment was pending in Allegany county court, between Elizabeth Vrooman, as plaintiff, and John Z. Vrooman, as defendant, to recover a house and lot in the town of Cumberland; that prior to the October term, 1848, of said court, John Z. Vrooman died, leaving his widow, the appellant, in possession of the premises, which she leased to Joseph Pelton, who occupied them and paid rent as such until the second of April, 1849. She also offered in evidence an agreement entered into the second of April, 1849, between the appellee, as attorney of Elizabeth Vrooman, Henry Fleury, and the appellant, by which it was agreed and understood by and between the parties that the appellant was to allow of the substitution of Fleury, at an increased rent, for Pelton, as tenant of the premises for one year; the rent (one hundred dollars) to be paid to the appellee, and by him to be paid—to use the language of the agreement—"to the successful party in an ejectment suit now [then] pending in Allegany county court for the said house and lot, between Elizabeth Vrooman, as lessee of the plaintiff, against John Z. Vrooman, deceased," etc. The appellant also gave in evidence the proceedings in the ejectment suit, by which it was shown that by the leave of the court she appeared to the action, and that subsequently, by direction of the attorney of Elizabeth Vrooman, a judgment of *non pros.* was rendered by the court. The occupancy of the premises by Fleury, and the payment of rent to appellee until the first day of April, 1851, were also proved.

To rebut this evidence, the appellee offered to prove the property was that of Elizabeth Vrooman, and that John Z. Vrooman, her son, took possession of it as such, and being so possessed at the time of his death, his widow, the appellant, continued to hold and exercise control over it. To the admissibility of this

testimony the appellant objected, but the court overruled the objection. It is the admission of this testimony which constitutes the first exception. We are of opinion the court erred in allowing this testimony to go to the jury, and also in granting both of the prayers of the appellee.

The agreement ascertained, by its own terms, to whom the rent was to be paid, by fixing the mode by which the title to the property was to be established. There was consideration for this agreement. The appellant, by her tenant, was in possession of the premises; she could not be removed except by legal proceedings. Besides, by the terms of the agreement the rent to be received for the property by the person entitled to it was to be increased. This circumstance, independently of all others, furnishes a sufficient consideration to support the contract. The agreement admits that Fleury was to take possession as the tenant of the appellant, and it was not competent for him to dispute her title, nor, under its terms, could the appellee or Elizabeth Vrooman do so, otherwise than in the manner pointed out. So far from the ejectment suit establishing the right of Elizabeth Vrooman to the rent, it established the reverse.

The appellee is merely a stake-holder, and it is no more competent to him than it was to the tenant Fleury to question the right of the appellant to the rent, otherwise than as agreed upon between all the parties.

The appellee insists that the appellant can recover, if at all, only the rent for the first year, on the ground that as plaintiff is relying on the agreement she must be bound by its terms. This is an action for money had and received, in which the plaintiff can recover any money in the hands of defendant which *ex æquo et bono* belongs to the plaintiff. The suit is not brought on the agreement. It is relied upon as evidence to show how the money came into the possession of the appellee, who, having received it from the tenant of the appellant, must be adjudged liable for the whole amount.

There is no question in regard to the receipt of the rent by the appellee; and it is a well-understood principle of law that where a tenant from year to year holds over, without any new stipulations between the parties, he impliedly holds subject to all the covenants in his lease; and in the absence of any new stipulation, the law implies those terms which are found in the contract which has expired; *De Young v. Buchanan*, 10 Gill & J. 149 [32 Am. Dec. 156].

Judgment reversed and *procedendo* awarded.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE: See *Farrow v. Edmundsen*, 41 Am. Dec. 250; *Heath v. Williams*, 43 Id. 265; *Bailey v. Kilburn*, Id. 423; *Rigg v. Cook*, 46 Id. 462, and cases cited in the notes.

HOLDING-OVER TENANT IMPLIEDLY HOLDS UNDER COVENANTS IF PRIOR LEASE: *De Young v. Buchanan*, 32 Am. Dec. 156; see also *Stedman v. McIntosh*, 42 Id. 122, and note.

THE PRINCIPAL CASE WAS REFERRED TO AND RELIED ON AS AUTHORITY FOR THE FIRST POINT IN THE SYLLABUS IN THE FOLLOWING CASES: *O'Neill v. School Commissioners*, 27 Md. 240; *Spikes v. Nydigger*, 30 Id. 320; *N. M. Bank of Baltimore v. National Bank of Baltimore*, 36 Id. 26.

HOLLIDA v. SHOOP.

[4 MARYLAND, 465.]

WHERE TWO PARTIES MADE PAROL AGREEMENT TO PURCHASE LAND JOINTLY, but the purchase was made by one alone on his own credit, who gave bond for the purchase money, occupied the property many years, sold and conveyed a part of it, but afterwards proving unable to advance his share of the purchase money, it was advanced by the other, who took a conveyance of the whole in fee: *Held*, that judgments rendered against the party who made the purchase prior in date to the conveyance are liens upon his interest in the land; but as to those rendered subsequently to that period, the party to whom the conveyance is made is entitled to relief by perpetual injunction.

TO ESTABLISH RESULTING TRUST BY PAROL, there must be the clearest and most indisputable proof that the purchase was made for the party claiming such trust, and the purchase money paid by him.

STATUTE OF FRAUDS applies where a purchase is made by one in his own name and upon his own credit, and it can not be proved by parol that the purchase was for another's benefit.

SUBSEQUENT ADVANCES WILL NOT ATTACH BY RELATION a resulting trust to the original purchase.

AFTER PURCHASE WITH PARTY'S OWN MONEY OR CREDIT, a subsequent tender or reimbursement by another may be evidence of some other contract, or the ground of some other relief, but can not by retrospective effect produce a resulting trust.

APPEAL from the equity side of the circuit court for Washington county. John W. Hollida, plaintiff; Adam Shoop *et als.*, defendants. Bill praying an injunction restraining execution sale of land, and that plaintiff's title to same be perfected, and for general relief. There was judgment for the defendants, and plaintiff appealed. The other facts are stated in the opinion.

Jervis Spencer, for the plaintiff.

R. H. Alvey, for the defendants.

By Court, LE GRAND, C. J. The object of the bill in this case is to quiet the title of the appellant and to restrain the exe-

cution of certain judgments obtained against William Grove. It substantially alleges that the complainant and Grove, in the year 1836, entered into an arrangement jointly to purchase of a certain Michael A. Finley, executor of Samuel Lynch, deceased, certain real estate; that Grove residing in the neighborhood of the lands intended to be purchased, the negotiations and transactions relating to the purchase were confided to him; and that the contracts were made with Grove, the complainant being understood to be jointly interested in the same. The bill further avers that Grove subsequently proving incapable and insufficient to advance his share of the purchase money, the same was paid by complainant, and that on the sixth day of October, 1846, Finley, the executor of Lynch, and Grove and wife executed and delivered to him a deed in fee for the land purchased of Finley. It is also averred that the defendants, having judgments against Grove, have caused executions to issue thereon, and to be levied on the land purchased of Finley and conveyed by him, and Grove and wife, to complainant. The prayer of the bill is, that the sale of the land may be restrained, and title of complainant decreed to be good and quieted, and for general relief.

The defendants severally answered the bill. The answer of Enswinger, which, so far as its averments and denials are concerned, is adopted by the defendant Dillinger, denies that the complainant and Grove purchased the land jointly, and insists that Grove was bound to pay the whole of the purchase money. It denies that the whole purchase money, or the pretended share of Grove, was advanced by complainant. The answer also further avers that Grove purchased of Finley, in two purchases made in 1836 and 1840, four hundred and fifty acres of land, for the sum of nine thousand and twenty-seven dollars, and that in the year 1842 Grove sold to Stephen Butterbaugh two hundred acres of said land for the sum of six thousand dollars; that Grove not having the legal title to the land, Finley joined with Grove and wife in the deed to Butterbaugh. It is also stated that the six thousand dollars, the consideration in Butterbaugh's deed, were paid to Finley on account of the entire purchase of the four hundred and fifty acres.

Adam Shoop and Israel Knodle disclaim all interest in the proceeding, alleging that they have assigned their judgments to persons at whose instance executions have issued.

The proceedings show that the sales were made by Finley to Grove, and reported to and confirmed by the orphans' court as

sales made to Grove; and also that Grove gave his single bills for a part of the purchase money, on which suits were brought in Washington county court, and for which four several judgments were obtained.

To sustain the case made by the bill, William Grove was examined. He testified in substance that the purchases were made in his own name, and that complainant was not named in the transaction, but that it was agreed between them the complainant should furnish the money, which he did. The deposition of Grove assigns various reasons why the transaction was conducted in his name without reference to complainant, the principal of which is that he lived near the land, whilst the complainant resided in Virginia.

On this state of case, we are of opinion the complainant is not entitled to the relief he asks, except as to the judgment of Enswinger, which is subsequent in its rendition to the date of the deed of Finley, and Grove and wife, to Hollida.

We do not deem it important to inquire whether the testimony of Grove is supported by the circumstances attending the sales made by Finley, and ratified by the orphans' court of Washington county, as made to Grove alone. It is clear from the evidence that the six thousand dollars paid by Butterbaugh for a portion of the land were paid to Finley in part payment of the original purchase money; and also that Grove gave his obligations for a portion of the latter, and that judgments against him were recovered on these single bills. It is also equally incontestable that he publicly dealt with the land as though he alone was the owner. These facts militate against the theory of the case of the complainant as set up in his bill. But even were it conceded, *ex gratia argumenti*, that the testimony of Grove fully and completely sustained the bill, still the inquiry would be, Is the complainant on such a case entitled to the relief he asks? And we think he is not. On the payment of the purchase money Grove would have been entitled to a deed from Finley. This right could not have been defeated by Hollida, except on the ground that the land was purchased for him and that he paid the purchase money, and to establish these facts the testimony must be of the clearest and most indisputable character; for in its nature it is an effort to establish by parol a resulting trust: *Faringer v. Ramsay*, 2 Md. 365.

In the case of *Parker v. Bodley*, 4 Bibb, 102, it was held that an agreement by parol between two persons to purchase land, one of whom was to make the purchase, and each to pay one half

of the price and take one half of the land, was within the statute of frauds, and no trust results in favor of the party who did not make the purchase, although the statute speaks not of contracts to purchase but for the sale of land, etc. Now, this is precisely the agreement set out in the bill in this case. And if we look to the facts in the case, independently of those testified to by Grove, the case is equally within the statute. It has been held that if A. buy in his own name and upon his own credit, the statute of frauds is applicable; and it can not be proved by parol evidence that the purchase was for another's benefit: *Fowke v. Slaughter*, 3 A. K. Marsh. 57 [13 Am. Dec. 133].

If Hollida have any right as against the judgment creditors, whose judgments are prior in date to the deed from Finley, and Grove and wife, to him, it must arise from the alleged payment by him of the whole purchase money. But it is beyond dispute, the sale was made to Grove, and on his credit, for he gave his obligations for a portion of the purchase money. Any subsequent advance by Hollida would not be sufficient to create a resulting trust in his favor. To use the language of Chancellor Kent, in the case of *Botsford v. Burr*, 2 Johns. Ch. 409, a subsequent advance "might be evidence of a new loan, or be ground of some new agreement, but it would not attach by relation a trust to the original purchase; for the trust arises out of the circumstance that the moneys of the real and not of the nominal purchaser formed at the time the consideration of that purchase, and became converted into land." In the same case the learned chancellor remarks: "After a purchase with his own moneys or credit, a subsequent tender, or even reimbursement, may be evidence of some other contract or the ground of some other relief; but it can not, by any retrospective effect, produce the trust of which we are speaking. There never was an instance of such a trust so created, and there never ought to be."

From this it is manifest that the complainant is not entitled to relief as against the judgment creditors prior to the date of his deed. That conveyance could not affect liens which had previously matured; and under our act of assembly of 1810, c. 160, equitable interests in lands are bound by judgments against the party having the equity. The deed could only convey the title subject to the incumbrance then on the property.

We affirm so much of the decree of the court below as dissolves the injunction and dismisses the bill of complainant as against the judgment creditors whose judgments are prior to the sixth of October, 1846, the date of the deed to Hollida, and

reverse it so far as it has reference to judgments rendered since that time. In regard to these latter we perpetuate the injunction.

Decree affirmed in part and reversed in part.

JUDGMENT MAY BE ENJOINED, WHEN.—In *Jones v. Commercial Bank of Columbus*, 35 Am. Dec. 419, it was held that when a party has a good defense at law, but has been prevented from using it by fraud or accident unmixed with any fault or negligence on his part, a court of equity will relieve him by granting a new trial, or by a perpetual injunction.

RESULTING TRUST DEFINED AND ILLUSTRATED: See *Neill v. Keese*, 51 Am. Dec. 746, and note 751.

STATUTE OF FRAUDS, RESULTING TRUST NOT WITHIN: *Dow v. Jewell*, 45 Am. Dec. 371.

THE PRINCIPAL CASE WAS FOLLOWED in *Brauner v. Staup*, 21 Md. 337, and *Keller v. Keller*, 45 Id. 275, on the point that subsequent advances will not attach by relation a resulting trust to the original purchase. In *Green v. Drummond*, 31 Id. 79; *Hill v. Hill*, 38 Id. 185, and *Plummer v. Jarman*, 44 Id. 639, it was followed on the point that a party could not prove by parol that a purchase of land in his name was made for another's benefit; such contracts, coming within the statute of frauds, should be expressed in writing.

MARSHALL v. HANEY.

[4 MARYLAND, 498.]

PATENT AMBIGUITIES EXIST OR APPEAR on the face of the writing itself, and as a general rule can not be explained or removed by extrinsic evidence.

COURT IN INTERPRETING PATENT AMBIGUITY should ascertain the meaning of the words actually employed, and not what the parties may have secretly intended.

LATENT AMBIGUITY EXISTS where the description contained in a written contract or other instrument, of the person, place, or thing intended, is applicable with equal certainty to each of several subjects; and extrinsic evidence is admissible to show which of those several subjects was meant by the parties to the instrument.

PARTY ACCEPTING DEED IN GOOD FAITH, which does not embrace the identical lands described in the covenant, can not afterwards dispute the same.

IN ACTION FOR BREACH OF COVENANT IN NOT CONVEYING lands described in deed, the value of the land at the time of the breach constitutes the measure of damages.

REMOTE AND COLLATERAL FACTS AND CIRCUMSTANCES, irrelevant to the issue, are inadmissible in evidence.

AGENT'S DECLARATIONS DO NOT BIND PRINCIPAL under any circumstances until the agency is first clearly established.

INSTRUCTION UNSUPPORTED BY EVIDENCE, properly appearing in the trial, should be rejected.

COVENANT. Appeal from the circuit court of Washington county. The agreement upon which the action was brought is set out in the opinion. During the course of the trial defendant offered—1. To show the value of lands contiguous to the tract in question at the time the sale was made, but the court rejected the testimony; 2. Plaintiff adduced proof showing the admissions made by defendant, both as to a description of the tract, and 3. The value of the same; 4. The value of the lands received as part payment for the tract in question—to all of which defendant excepted; 5. Defendant offered certain instructions, which the court refused to allow; 6. Plaintiff asked for the following instructions: If defendant, at the time of the execution of his deed to the plaintiff, knew it did not embrace the land sold by him to plaintiff, but other and different land, and this was unknown to plaintiff, though he accepted the deed, such acceptance would not make it binding on the plaintiff, nor be a fulfillment of defendant's covenant to convey, provided the deed was abandoned after knowledge of the facts. If the deed was never delivered, and the contract was abandoned, then the execution of the deed was no evidence of acceptance. The instructions were granted, and defendant excepted. The plaintiff obtained a verdict, and defendant appealed, assigning that the verdict was against evidence, and that the court erred in refusing to grant the instructions asked for.

J. Dixon Roman and William Price, for the appellant.

Jervis Spencer, for the appellee.

By Court, MASON, J. This case has already been before the court of appeals, and is reported in 9 Gill, 251. The principles settled by that decision are to govern the case as we now find it, so far as they are applicable.

We shall proceed to express our views upon the general principles of law which are to control our decision, and will then apply them to the several questions as they are presented by the exceptions, and in the order in which they arise.

Our first duty will be to interpret the covenant, the alleged breach of which forms the basis of the present action. That part of the covenant with which only we have to do, is in these words: "Marshall agrees and binds himself to convey to the said Haney, his heirs and assigns, in fee simple, by a good and sufficient deed of bargain and sale, clear of all incumbrances, three hundred and twenty acres of unimproved land, situate in Clark county, Missouri, being the same land which was pur-

chased from government by a certain Samuel Zeller and John A. Rench, and by said Rench and Zeller sold to said Marshall; said three hundred and twenty acres of land in Missouri is valued at two thousand one hundred dollars, and said Haney agrees to receive said three hundred and twenty acres of Missouri land in part payment of the said one hundred and twenty-five acres of land," etc.

It is contended that this covenant presents a case of ambiguity, which can be legitimately and only explained by the aid of oral or extrinsic testimony.

Patent ambiguities exist or appear on the face of the writing itself, and as a general rule, can not be explained or removed by extrinsic evidence: 4 Phill. Ev., Cowen's ed., 1358, note 938; *Peisch v. Dickson*, 1 Mason, 9. In such cases it is the duty of the court to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words import, but what is the meaning of the words actually employed: *Beaumont v. Field*, 2 Chit. 275; *Doe v. Gwillim*, 5 Barn. & Adol. 122, 129.

If there be ambiguities (whether latent or patent) in this covenant, one of them would consist in the doubt whether the land to be conveyed by Marshall to Haney was conveyed to the former by Zeller and Rench jointly, or whether it was to consist of land conveyed by each separately. If extrinsic evidence is admissible at all to explain this doubt, it must of necessity be directed to that ambiguity alone; that is, whether the land had been separately or jointly conveyed by Zeller and Rench. But it would not be competent, clearly, under any power to explain ambiguities in written instruments, for either party to show in this case, by parol evidence, that the land intended to be embraced in the covenant was land conveyed by Zeller alone or by Rench alone. Surely, the covenant is not silent or ambiguous on this point, and to admit such testimony would be virtually to make a new contract, and thus violate the well-established doctrine that a written instrument can not be varied or contradicted by parol or extrinsic evidence. Any attempt by Marshall to convey land which he had received from either Zeller or Rench alone would be in fact a breach of the covenant, and Haney would not have been bound to accept such a deed.

If there be no such ambiguity to explain, is there any other latent ambiguity which needs explanation by parol evidence?

Where the description contained in a written contract or other instrument, of the person, thing, or place intended, is ap-

plicable with equal certainty to each of several subjects, this would constitute a latent ambiguity, and extrinsic evidence is admissible to show which of those several subjects was meant by the party or parties to the instrument of writing: *Miller v. Travers*, 8 Bing. 244; *Doe d. Gord v. Needs*, 2 Mee. & W. 129. Latent ambiguities are first created by extrinsic evidence, which afterwards renders extrinsic evidence necessary to explain or reconcile them. For example, if A. make a devise of a particular house to his cousin B., there would be no difficulty, upon its face, in construing such a will. But if it be shown *aliunde* that A. has two cousins named B., extrinsic evidence must be given to show which of the two was intended. So in the case now under review, it is said that a latent ambiguity exists, which extrinsic evidence can disclose and afterwards explain; and that ambiguity is said to consist in this, that particular lands conveyed by Zeller and Rench to Marshall were by the latter to be conveyed to Haney; that those lands were to lie in one body, and that it was legitimate for the plaintiff to show which particular lands he was to receive.

These propositions might involve questions of very difficult solution did not the decision in the former case come to our aid and relieve us from the necessity of determining them.

Deeds from Zeller and Rench to the defendant, a deed from the defendant to the plaintiff, embracing part of the land received from Zeller and Rench, in separate tracts, and also a deed from Haney to Chaney for the identical lands which Marshall had conveyed to Haney, are spread out in this record. The deed from Marshall to Haney, if accepted *bona fide* by the latter, would operate as a full discharge of the covenant of Marshall. The subsequent conveyance by Haney to Chaney of the identical lands conveyed by Marshall is evidence that the defendant's deed was accepted by Haney; and whether Mr. Yost, in whose possession this deed was found, was plaintiff's or defendant's attorney, it matters not; the deed to Chaney constitutes the evidence of Haney's acceptance of Marshall's deed.

This court have said on the former trial that although the lands embraced in this deed were not the identical lands named and described in the agreement, yet in the absence of evidence of mistake, misrepresentation, or fraud, if Haney accepted the deed under the covenant, it discharged it: *Marshall v. Haney*, 9 Gill, 259. See also *Wesley v. Thomas*, 6 Har. & J. 29.

This view shuts out all questions about ambiguities, election, and the like. If the deed was accepted under the circum-

stances above enumerated, the lands embraced in it are to be considered as the identical lands mentioned in the written agreement, together with all the parol explanations or additions which might by possibility be made to it.

One other principle decided on the former trial applies to the present record, and that is, in the present suit for the breach of the covenant in not conveying the Missouri lands the time at which the breach occurred was the period at which the value of the lands should be estimated in assessing the damages.

With these general views to guide us, we will proceed to dispose of the several exceptions.

The first exception relates to the admissibility of the defendant's testimony, offered for the purpose of showing that the valuation placed upon the lands by the parties to the covenant at the time of its execution was merely conventional, and formed no just standard of their real value.

Apart from the doubt which we entertain whether the party would be permitted thus to qualify if not to contradict his covenant, we can not discover the relevancy of this evidence to any issue in the cause. The alleged breach of the covenant consists of the non-conveyance by the defendant of the Missouri lands, and the court of appeals have said the damages for not doing so would be the value of the lands at the time of the breach of the covenant. As a consequence, the value of the lands, whether in Washington county or Missouri, at the time of the execution of the covenant, could have no influence upon the jury in assessing the damages. The covenant was entered into in 1841, and its alleged breach took place in 1844, when the deeds between Marshall and Haney were executed, and it matters not how much the land in the mean time had increased or depreciated, its value at the latter period was to constitute the measure of damages in a suit by either party.

For the reasons mentioned, we think the testimony was properly rejected, and we affirm the ruling in this exception.

For the reasons we have already expressed, it will be readily seen that Chaney's testimony, or so much of it as was objected to, as set out in the second exception, was inadmissible, and the court below was in error in receiving it. The attempt to show by Marshall's admissions that the land Haney was to get consisted of the land the defendant had purchased from Zeller alone, was to contradict the express terms of the written agreement, which provided that the land was to consist of what had been purchased from Zeller and Rench.

The third exception presents the question of the admissibility of the testimony of Jervis Spencer, esq. It does not appear from the record specifically for what purpose this testimony was offered. If intended to show, as a part of the agreement between Marshall and Haney, that the land to be conveyed by the former was to lie in one body, it was inadmissible. After Haney had accepted the deed from Marshall for the land in separate parcels, it was too late for him to attempt to show that the covenant contemplated land in one body. Evidence, however, offered for a particular purpose may be properly rejected, though admissible generally, or for some other purpose: *Goodhand v. Benton*, 6 Gill & J. 481.

If the declarations of the defendant as proved by this witness were offered to establish fraud on his part, or mistake in the acceptance of the deed by the appellee, and were made before his deed to Haney was executed, they were not *per se* evidence, and therefore inadmissible, unless accompanied by a proffer to follow them up with other facts connected with those admissions, from which the jury could rationally infer the fraud or mistake intended to be established. Whatever may have been the previous understanding of these parties as to the lands being in one body, if the plaintiff afterwards accepted the deed for them in separate tracts, it was virtually a waiver of his right to insist upon their being in one body, and hence the isolated declarations of the defendant in question made before the deed are rendered wholly immaterial.

“It is a well-settled rule of evidence,” say this court, in *Davis v. Calvert*, 5 Gill & J. 304 [25 Am. Dec. 282], “that remote and collateral facts and circumstances, not relevant to the issue to be tried, are inadmissible in evidence;” and they further add: “It is sometimes difficult to ascertain whether a particular fact offered in evidence is connected with the issue, and will or will not become material in the progress of the investigation. In such cases the court not clearly seeing that it is wholly foreign and irrelevant to the issue, and can not be connected with it by evidence of other facts and circumstances, it is proper and usual in practice to admit the proof, on the assurance of the counsel who tenders it that it will turn out to be pertinent and material.” No such assurance was given in this instance.

If, on the other hand, these admissions were made after the deed was executed, they would have been evidence *per se*, as tending to show the alleged fraud or mistake. If the defend-

ant admitted after the deed had been executed that the lands were to be in one body, without any qualifying or explanatory remarks showing that the plaintiff had waived his right to have them entire, it might well be a circumstance, however slight, in connection with other facts, tending at least to show that there had been a mistake, if not a fraud, in the transaction. Evidence relative to the issue is admissible, though it be insufficient, unless followed and supported by other evidence: *Whittington v. The Farmers' Bank of Somerset and Worcester*, 5 Har. & J. 489.

But as this case is reversed and remanded on *procedendo*, it becomes a matter of small importance when we determine from the record these admissions of the defendant were made, whether before or after the deed. The suggestions which we have thrown out will be sufficient to guide the parties upon this point on a future trial. Inasmuch, however, as the exception does not disclose with sufficient distinctness when these conversations between the witness and defendant took place, we regard them as inadmissible. Thereupon the ruling upon the third exception is reversed.

The evidence set out in the fourth exception, so far as it went to establish the value of the Missouri land, by the defendant's own statements and admissions, was a proper item of evidence. They related, in part, to the very period when the breach of the covenant is alleged to have taken place. It is also clear that the declarations of Kinkle, detailed by the same witnesses, were not legal evidence. The declarations of an agent are not admissible to bind his principal, under any circumstances, until the agency is first clearly established, which has not been done in this instance. Inasmuch, however, as part of the evidence embraced in this exception was admissible, as we have shown, it was irregular for the defendant's counsel to ask for the rejection of the whole, and the court was therefore right in not sustaining this application. For these reasons, we affirm the court below upon the fourth exception.

The principles by which we are to determine the correctness of the circuit court's decision as presented by the fifth exception have been settled by this court upon the former trial. It is true, there appears to be some apparent conflict in the opinion of the court of appeals upon this point. The prayer of the defendant, which had been rejected by the county court on the former trial, presents substantially the same legal propositions as those which are contained in the two prayers of the defendant now before

us under the fifth exception. These propositions were: "That the acceptance by Haney of the deed from Marshall, for the three hundred and twenty acres of Missouri lands, mentioned in the articles of agreement on which suit is brought, was *prima facie* a full performance of Marshall's covenant to convey, which by such acceptance became discharged, and the execution by Haney of a deed for the same lands to Chaney is an admission of his acceptance of the deed from Marshall, and the plaintiff is not entitled to recover:" *Marshall v. Haney*, 9 Gill, 253. Upon a proper state of pleadings (which did not then but which now exists), the court said that the foregoing prayer ought not to have been rejected. This we regard as the decision of the court by which we are to be bound. It is true, the judge who delivered the opinion adds these qualifying remarks, that "in the absence of evidence of mistake, misrepresentation, or fraud, if Haney accepted this conveyance from Marshall in discharge of this stipulation in the agreement, it did discharge him." Thus a material qualification, which is not presented by the former or present prayers, is added. We are asked by the appellant's counsel to adopt the legal propositions as contained in the original prayer as they stand; while the counsel for the appellee insists that they can only be adopted with the qualification annexed, and that as a consequence the prayers now before us, which omit this qualification, are wrong. Upon the determination of this alternative depends the reversal or affirmance of this exception.

The abstract proposition is undoubtedly true, that if the acceptance of this deed by Haney was the result of mistake, misrepresentation, or fraud, he would not be compromitted by it. But it is equally true that unless there is evidence to support this legal proposition, it can not be incorporated into the case. It is the duty of courts of justice not to moot questions, but to decide those which are really presented. Therefore any instruction which may be asked for by counsel, however correct in the abstract, should be rejected by the court, if unsupported by evidence properly in the cause. As this case is now presented by the record, we can discover no legal evidence to warrant the submission to the jury of the question whether or not the plaintiff had mistaken the purposes of the deed, or had been circumvented by the defendant. We then understand the former decision to be in substance this, namely, that the law of the former case, as made by the evidence, was embraced in the prayer submitted by the defendant's counsel; and that the qualification

respecting fraud, mistake, etc., would be the law, if such a case were made by the introduction of new testimony upon a subsequent trial. We do not discover that the case has been materially varied, and in the absence of evidence of mistake, misrepresentation, or fraud in the present record, we think the two prayers of the defendant embraced in the fifth exception ought to have been granted.

The first prayer of the plaintiff presented by the sixth exception puts a case of fraud on the part of the appellant, and mistake in the appellee, in accepting the deed. The only item of testimony in the whole record which would tend to prove such an allegation was the testimony of Mr. Spencer, already commented upon under the third exception, conceding that testimony to be free from the objections therein pointed out, and admissible. This testimony, however, will be found wholly unsupported by any other facts adduced in the progress of the trial from which a rational inference could be drawn of the fraud or mistake intended to be established. Standing alone, the admissions of the defendant, as proved by this witness, of themselves, establish nothing against him. We think, therefore, this prayer ought not to have been granted.

The prominent vice in the plaintiff's second prayer consists in its seeking to make Chaney virtually the arbiter between the plaintiff and defendant, and to clothe him with power to say whether the land conveyed by the latter to the former was the identical land embraced in their covenant or not. The deed from Haney to Chaney was a circumstance wholly immaterial and irrelevant to the present controversy, except so far as it afforded evidence of the acceptance by Haney of the deed from Marshall. It was therefore unimportant whether Chaney accepted the appellee's deed or not, and it was equally immaterial for what reason he refused to accept it. Because Chaney was unwilling to take land from Haney in detached pieces, it by no means follows that Haney would object to take separate tracts from Marshall. Indeed, neither the transactions nor the reasons for them between Chaney and Haney have anything to do with the case now before us. The attempt by the plaintiff to sell and convey the land to Chaney was an act of ownership over it, and as such, was evidence that he had accepted the deed from Marshall for the identical lands.

There are several legal propositions embraced in these two prayers which are erroneous, and if one or more of several propositions contained in the same prayer be incorrect, though

all that remain be right, the court could not properly grant such a prayer in its entirety.

We have intended to and hope we have settled all the material questions in the present controversy, by which the court below may dispose of the case finally upon its next trial, unless it is materially varied by the introduction of new evidence.

We overrule the judgment of the circuit court upon the second, third, fifth, and sixth exceptions, and affirm it upon the first and fourth.

ECCLESTON, J., concurred in the reversal of the judgment below, but differed from the majority of the court in some of the views expressed in their opinion.

Judgment reversed and *procedendo* awarded.

PATENT AMBIGUITY, PAROL EVIDENCE INADMISSIBLE TO EXPLAIN: See *Newcomer v. Kline*, 37 Am. Dec. 74, and cases cited in note 77.

LATENT AMBIGUITY—PAROL EVIDENCE IS ADMISSIBLE TO EXPLAIN the meaning of terms in a deed, but not to contradict those terms when their signification is obvious without evidence: *McCorry v. King's Heirs*, 39 Am. Dec. 165.

MEASURE OF DAMAGES FOR BREACH OF COVENANT TO CONVEY: See *Rohr v. Kindt*, 39 Am. Dec. 53, and cases cited in note 56.

RELEVANCY OF EVIDENCE: See *B. & S. R. R. Co. v. Woodruff*, *ante*, p. 72.

LIABILITY OF PRINCIPAL FOR AGENT'S ACTS: See *Keener v. Harrod*, 56 Am. Dec. 706, and note citing prior cases in this series.

INSTRUCTION BASED ON DIFFERENT STATE OF FACTS from that proved should be refused: *Henderson v. Western M. & F. Ins. Co.*, 43 Am. Dec. 176; *B. & S. R. R. Co. v. Woodruff*, *ante*, p. 72.

THE PRINCIPAL CASE WAS APPROVED and followed in *Clagett v. Easterday*, 42 Md. 628, to the effect that where a party fails to perform his contract to convey land, the true measure of damages is the value of the land at the time of the breach of the covenant. In *Duval v. Duval*, 21 Id. 155, to the point that where evidence is offered for a particular purpose for which it is inadmissible, it should be rejected. In *Rosenstock v. Tormey*, 32 Id. 182, and in *National Mechanics' Bank of Baltimore v. National Bank of Baltimore*, 36 Id. 21, to the effect that the declarations of an agent are not admissible to bind the principal under any circumstances until the agency is first clearly established.

MAYHEW v. BOYD.

[5 MARYLAND, 102.]

RELEASING INDORSER—SALE OF MORTGAGED PROPERTY.—A. and B. indorsed three promissory notes, payable at different dates, upon condition that the maker should execute a mortgage to the payee, conditioned that the mortgaged property should be sold if said notes were not paid at maturity. The first note fell due, was protested, etc., but was replaced

by a new note, with the consent of all concerned. After the original but before the new or any of the other notes fell due, the mortgaged property was sold, with the consent of the mortgagor and maker of the notes, but not of the indorsers, and the proceeds of the sale applied to the payment of the two notes first falling due, without protesting them, and suit was brought against the indorser upon the third note: *Held*, that the right to sell, which arose when the first note was not paid, ceased with the substitution of the new note, and that a sale before the maturity of said new note violated the contract between the parties, and discharged the indorser.

ANY DEALINGS BY CREDITOR WITH PRINCIPAL DEBTOR which amounts to a variation from the contract by which the surety is to be bound, and which by possibility might vary or enlarge the latter's liability without his consent, operates as a discharge of such surety.

ASSUMPSIT upon a promissory note for nine hundred dollars, made by W. B. Pyfer in favor of one Robert Close, and indorsed by Close and defendant to plaintiff. This suit is brought by plaintiff as holder against defendant as such indorser. Plea, *non assumpsit*. It is admitted that the note was duly made, indorsed, protested, and due notice given to the indorser. Defendant then introduced in evidence a mortgage of certain hotel furniture executed by Pyfer, the maker of the note to Mayhew. This mortgage is dated upon the same day as the note, and was made to secure the payment of three promissory notes, one payable to Boyd, and the other two to Close, and indorsed by them to plaintiff. One of said notes, the one upon which this suit was brought, was for nine hundred dollars, payable in one year; another was for five hundred and ninety-four dollars and sixty-one cents, at six months; and the last was for five hundred and ninety-four dollars and sixty-two cents, at four months. The mortgage was conditioned that if the sum for which the mortgage was made was paid "according to the tenor and effect of said notes," the mortgage to be void; if not, Mayhew, the mortgagee, might sell the mortgaged property, and apply the proceeds to the payment of said notes, and pay the balance to the mortgagor. When the note at four months became due, it was duly protested, but a short time afterwards another note for six hundred and fourteen dollars and thirty-nine cents was given, payable in forty days, drawn by Pyfer, and indorsed by Boyd and Close, by way of renewal of said dishonored note. It was also proved that after the maturity of the four months' note, but before the maturity of the new note, or of either of the others, the mortgaged property was sold, with the consent of the mortgagor and upon the authority of the mortgagee, and the proceeds of the sale paid over to Mayhew, who applied them

to the payment of the notes as they fell due. The money thus obtained was more than sufficient to pay the first two notes, and they were so paid without being presented to Pyfer for payment, nor were they protested, nor was notice given to the indorsers. It was also established that at about this time Pyfer was worth considerable money.

Hinkley, for the appellant.

Pitts, for the appellee.

By Court, MASON, J. The record in this case shows that the indorsement by the defendant of Pyfer's notes to the plaintiff was based upon the security afforded by the mortgage, and therefore the mortgage may be regarded as the consideration of the agreement into which the surety entered when he consented to indorse the notes. The terms of the mortgage, therefore, must be strictly complied with by the plaintiff in order to bind the defendant as indorser. One of those terms is, there shall be no sale of the mortgaged property until default of the principal debtor to pay the notes upon their maturity. We think this part of the contract between the several parties thereto has been departed from in the sale which has taken place under the circumstances detailed in the evidence. This sale took place before the maturity and dishonor of the notes in question, and without the assent, and for all we know without the knowledge, of the indorsers. It is true, the first of the original notes had fallen due and was dishonored, but it is equally true, by the assent of all parties another note was substituted in the place of it, which thereby took from the plaintiff his right to sell under the mortgage for the non-payment of that note: the effect of the substitution of the one note for the other was to place the new note in the same relation to the mortgage that the first one had borne. Before these notes became due, as we have already shown, the sale took place.

But it may be said that although this might have been a departure from the strict letter of the contract between the parties, yet it can not be shown that the indorsers were prejudiced thereby, or their liability enlarged. Whether this was or was not the result of the premature sale does not vary the question. Any dealings with the principal debtor by the creditor which amounts to a departure from the contract by which a surety is to be bound, and which by possibility might materially vary or enlarge the latter's liabilities without his assent, operates as a discharge of the surety. In this case it is not improbable, much

less impossible, that if the plaintiff had duly protested the first two notes as they fell due and were dishonored, the indorsers, or one of them, might have paid them off, and by immediately suing the debtor thereon might have secured the debt and thereby reserved the whole of the mortgaged property in the hands of the plaintiff for the purpose of meeting the third and last note upon its maturity. The sale of the mortgaged goods under the circumstances under which it took place deprived the indorser of the opportunity of pursuing the course we have pointed out, and of the chances at least of relieving himself from liability altogether.

Believing that the sale of the property under the circumstances was a violation of the terms of the contract with the indorsers by which their rights might have been prejudiced, they are thereby discharged.

Judgment affirmed.

CREDITOR "MUST DO NOTHING WHICH CAN IMPAIR RIGHTS AND REMEDIES OF SUBETY. Therefore, if any collateral security which the creditor held be released, or a judgment lien given up, or a levy withdrawn, the surety is discharged:" Daniel on Neg. Inst., sec. 1311, citing the principal case, together with *Commonwealth v. Haas*, 16 Serg. & R. 252; *Farmers' Bank v. Reynold*, 13 Ohio, 84; *Ferguson v. Turner*, 7 Mo. 497; *Sneed v. White*, 3 J. J. Marsh. 525; *Mayhew v. Crickett*, 2 Swans. 193; *Winston v. Yeargin*, 50 Ala. 340; *Woodward v. Walton*, 7 Heisk. 50; *Clopton v. Spratt*, 52 Miss. 251; *Case v. Hawkins*, 53 Id. 702; 5 Rob. Pr., new ed., 766; 1 Parsons on Notes & Bills, 242; Byles on Bills (*241), 386. See also *Scarborough v. Harris*, 1 Am. Dec. 609; *Sharpe v. Bingley*, 12 Id. 643; *Stewart v. Eden*, 2 Id. 222; *Newcomb v. Raynor*, 34 Id. 219; *Commercial Bank v. Cunningham*, 35 Id. 322; *Manufacturers' & M. Bank v. Bank of Penn.*, 42 Id. 240; but see *Mathews v. Fogg*, 44 Id. 257.

SMITH v. BRYAN.

[5 MARYLAND, 141.]

DELIVERY—STATUTE OF FRAUDS—GROWING TREES.—Where one person by a written contract sold to another trees growing upon the former's land, and the latter, after removing certain of the trees, resold the remainder to the owner of the land by a parol contract, the sale, under the seventeenth section of the statute of frauds, is a contract for the sale of goods, and the purchaser under said parol contract being in possession of the land upon which the trees were growing, the sale *eo instanti*, by force of law, gave possession of the trees to the defendant, and the delivery was perfect.

WHERE TIMBER, OR PRODUCE OF LAND, OR OTHER THING ANNEXED TO FREEHOLD, is sold specifically, whether it is to be taken by the vendee

under a special license to enter for that purpose, or whether it is to be severed from the soil by the vendor, in the contemplation of the parties it is still evidently and substantially a sale of goods only.

ASSUMPSIT by plaintiff against defendant, for the value of certain trees standing upon defendant's land. The declaration contains two counts: the first, a special count upon a parol contract by which plaintiff sold to defendant some five hundred and one pine trees, standing upon the land of defendant, said trees measuring five feet and upwards in circumference, at three dollars each, being some of the trees which defendant had previously sold to plaintiff; the second was a general count for the value of the trees. Plea, *non assumpsit*. It was shown that on July 15, 1849, the defendant, by a contract in writing, in consideration of one thousand two hundred dollars, sold to plaintiff certain oak and pine trees, with the privilege of at any time before July 15, 1852, entering to cut or carry away any of the timber. Under this contract plaintiff entered and carried away all the oak and part of the pine. He afterwards resold to defendant all the trees left standing, by a parol contract, as will be seen from the opinion. Upon these facts the defendant asked that the jury be instructed—1. That if there was no memorandum in writing of said sale, nor any delivery of the trees, nor any part payment or earnest to bind the bargain, then the plaintiff can not recover; 2. That there was no evidence to show a delivery of the trees, either actual or constructive; 3. If plaintiff had heretofore purchased the trees, and exercised acts of ownership over them, then the possession thereof was in him. The plaintiff asked for three instructions, the first of which was: "If the plaintiff offered to sell and the defendant agreed to buy said trees, and they were at the time standing on the land of defendant, the delivery was complete the instant the offer to sell was accompanied by the agreement to purchase, and the plaintiff is entitled to recover." The next two were similar to the above. The court granted defendant's instructions and refused plaintiff's, and from a judgment against him plaintiff appealed.

Carmichael and Brown, for the appellant.

Cook, Hopper, jun., and Robinson, for the appellee.

By Court, **LE GRAND**, C. J. This is an action of *assumpsit*, instituted by the appellant to recover from the appellee the value of certain trees standing on the land of the latter. It appears from the evidence in the record that in the year 1849

the appellee, by a written contract of sale, sold to the appellant certain trees standing on the land of the former, and that in pursuance of this contract the appellant cut down and removed a portion of the trees so purchased. It also appears that in the year 1850, in the presence of the appellee, the appellant said to the witness Larrimore, "I have sold to Mr. Bryan all the balance of the trees standing in the wood which will girt five feet and upwards for three dollars per tree, to which the defendant replied, 'Yes;' that is the bargain." It is on this oral contract the action is brought, the declaration containing two counts, one specially on the contract, and the other for the value of the trees.

It does not appear the appellee ever cut down any of the trees or exercised any control over their disposition. It does appear, however, from the testimony of the witness Tilghman, that in the year 1851 he, in company with another person, called upon the appellee "and informed him that they were going into his wood, at the instance of the plaintiff, to measure the trees, and asked the defendant to go along with them, which he (defendant) refused, saying he would have nothing to do with it."

On this state of facts, the plaintiff and defendant each offered three prayers to the court; those of the defendants were granted, and those on behalf of the plaintiff were rejected. This disposition by the court below of the several propositions we think was erroneous. The prayers of the defendant were all based on the idea that the contract proved was within the statute of frauds, and as it was not evidenced by anything in writing, or the trees delivered to or accepted by the defendant, that there could be no recovery. Those of the plaintiff present the theory that, inasmuch as the defendant was owner and in possession of the land on which the trees were growing, the sale *eo instanti*, by force of law, gave possession of the trees to the defendant. We think the propositions of the plaintiff ought to have been granted, and those of the defendant rejected.

The contract proved was one within the seventeenth section of the statute of frauds. The authorities establishing this proposition are numerous, both in England and this country. It would be both a useless and tedious work to examine them in detail; the more particularly so as that labor has been most completely performed by Mr. Greenleaf, in his work on evidence, vol. 1, sec. 271. The principle to be gathered from a majority of the cases seems to be this: "That where timber or

other produce of the land, or any other thing annexed to the freehold, is specifically sold, whether it is to be severed from the soil by the vendor or to be taken by the vendee, under a special license to enter for that purpose, it is still, in the contemplation of the parties, evidently and substantially a sale of goods only."

According to this view, the contract by which originally the defendant in this action sold to the plaintiff the trees, was one for the sale of goods; and as this was the character of the thing purchased by the plaintiff, that character was retained up to the time when the plaintiff resold to the defendant.

We do not see how it is possible to effectuate a delivery more perfect than the one in this case. The defendant owned and had possession of the land on which the trees were. It was not physically possible for the plaintiff to give him a more perfect possession, unless he had severed the trees from the soil, which, by the terms of the contract, he was not bound to do, and which in all probability would have defeated the motive of the defendant in making the repurchase, it being most likely that he was induced to engage in the transaction by a desire to have the trees remain standing on his land.

Judgment reversed and *procedendo* awarded.

CONTRACT FOR SALE OF STANDING TIMBER, to be cut and severed from the freehold by the vendee, does not convey to him any interest in the land within the meaning of the statute of frauds, but is to be construed merely as passing an interest in the trees when they are so severed. A mortgage of such standing timber, made by the purchaser thereof, is a mortgage of personal property, to take effect when it is severed from the freehold: *Clafin v. Carpenter*, 38 Am. Dec. 381, and note. But in *Putney v. Day*, 25 Id. 470, it was held that a contract for the sale of trees growing upon land should have been in writing, it being within the statute of frauds. The principal case is cited in *Marshall v. Ferguson*, 23 Cal. 69, to the point that sales of growing crops do not come within the provisions of the statute of frauds relating to sales of an interest in real estate, and that such sales, though not in writing, are valid.

RINGGOLD v. BARLEY.

[5 MARYLAND, 186.]

CITIZEN OF ONE STATE DOES NOT FORFEIT HIS RESIDENCE OR RIGHTS AS SUCH CITIZEN by leaving his place of abode and breaking up his establishment with the avowed purpose of becoming a resident of another state, if before he reaches his intended destination he changes his mind and returns.

NEW DOMICILE IS NOT ACQUIRED BY MERE INTENTION TO SO ACQUIRE IT, without the fact of an actual removal, nor is it acquired by the removal without the intention.

IF NEW PLACE OF RESIDENCE BECOMES FIXED PRESENT DOMICILE of a person, it is sufficient to fix a residence, although there may be a floating intention to return to his former place of abode at some future period.

RESIDENT OF MARYLAND WHO REMOVED TO MISSOURI and commenced pursuing the usual vocations of life, thereby adopts said latter state as a place of fixed present domicile, and he becomes a resident thereof, although he may have a floating intention to return to Maryland at some future period.

DEFENDANT CAN NOT APPEAL FROM JUDGMENT IN HIS FAVOR because instructions asked by him were not given, as he was not aggrieved by the result of the trial below.

CROSS-APPEALS from the Kent county circuit court. Rebecca Ringgold and her two children filed their petition for freedom June 14, 1851. At the hearing, petitioners took three exceptions, the first and third of which were not noticed by this court. The second exception was taken to the action of the court in refusing to give the instruction recited in the opinion herein. The instruction given in its stead was that if the jury believed that Money did positively determine to make Missouri his place of residence at any time after his arrival, if but for one moment, he thereby became a citizen of that state, although afterwards he might determine to return to Maryland. The remaining facts appear from the opinion.

Vickers, for the petitioners.

Wickes, for the defendant.

By Court, MASON, J. The appellants filed their petition in Kent county circuit court, in which they claim their freedom under the act of assembly of the year 1831, c. 323, sec. 4. By that act it is provided that it shall not be lawful to import or bring into this state any negro slave for sale or to reside; and any person so offending shall forfeit for such offense the negro brought into the state contrary to this act; and such negro shall be entitled to freedom, etc.

The testimony presents substantially this case: In the year 1832 Money, under whom the appellee claims the negroes, having sold all his property in Maryland, left for the state of Missouri, carrying with him the petitioner and other of his slaves, together with his own family. Such of his slaves as were unwilling to remove with him to Missouri had been previously sold to the south. He had repeatedly declared his in-

tention of settling in Missouri and of purchasing public lands in that state. That said Money, immediately on his arrival in Missouri, rented land and commenced farming; that he continued to farm till November, 1833, when, falling into bad health and changing his purposes, he sold out his property of every kind, except his slaves, and returned to Maryland, bringing with him the petitioner, Rebecca. On the nineteenth of March, 1834, Money returned a list of the slaves so brought back with him to the clerk of Kent county court, accompanied with the declaration, verified by oath, of his intention to become a citizen of this state.

Out of this state of facts, several questions arose in the trial below. We will proceed to consider, first, the questions presented by the second exception. The testimony having been closed, the petitioners prayed the court to instruct the jury "that if they believed Money left the state of Maryland with his family and servants and removed to the state of Missouri with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, and while there engaged in agriculture, it became his place of domicile, notwithstanding he might have entertained a floating intention of returning to Maryland at some future period." This prayer was rejected, whether properly or not we are now required to decide.

It is settled by many well-adjudged cases, especially by the case of *Cross v. Black*, 9 Gill & J. 198, that a citizen of one state may break up his establishment, and with the avowed purpose of becoming a resident of another, may actually leave his place of former abode, yet if before he reaches the point of his intended destination changes his purpose and returns, he does not thereby forfeit his residence or his rights as a citizen at the place of his first abode. The mere intention to acquire a new domicile, without the fact of an actual removal, avails nothing, neither does the fact of a removal without the intention: *Somerville v. Somerville*, 5 Ves. 750, 787; *Harvard College v. Gore*, 5 Pick. 370. When once removed to his new domicile, however, the party's purpose to remain need not be fixed and unalterable. If it becomes a place of fixed present domicile, it will be sufficient to fix a residence, and although there may be a floating intention to return to his former place of abode at some future period, still these circumstances will not defeat the newly acquired residence or the rights and obligations which attach to it.

The question now before us is, Was there evidence tending

to satisfy the jury that Money did acquire such a residence or domicile in Missouri as to forfeit his former residence in Maryland? In pursuance of the intention formed in Maryland, he did take up his abode in Missouri, and commenced pursuing the usual vocations of life. He identified himself and all his interests, for the time being at least, with his new place of abode. If his expectations had been realized and his hopes fulfilled, he doubtless would have made this new location his permanent abiding-place. Under such circumstance, we can not but regard the residence of Money at least as a place of fixed present domicile, notwithstanding he may have had a floating intention to return to Maryland at some future period.

If Story's Conflict of Laws is to be regarded as authority upon such questions, it settles the very point now under consideration. Indeed, the appellants' prayer, which was rejected, presents not only the principle announced by Story (Conflict of Laws, sec. 46, p. 58), but even employs his identical language; and to sanction that rejection would be to repudiate the high authority of Judge Story, which we are not prepared to do.

The case of *Baptiste v. De Volunbrun*, 5 Har. & J. 86, is entirely dissimilar from this. In that case the party was compelled by necessity, *a vis major*, which she could not resist, to leave her domicile and come to this state, and she "constantly and uniformly declared her intention to return to her own country whenever circumstances would permit her to do so with safety." In the present case the party left his first domicile voluntarily and with the avowed purpose of changing his place of abode, and in accordance with this purpose did actually take up his residence in another state, in the manner before detailed.

Admitting the instruction which the court gave, after refusing the prayer of the appellants, to be correct as an abstract legal proposition, yet, upon the testimony in the cause, it did not present the law to the jury in a light so favorable to the appellants as the prayer presented by them, and which we think they had a right to insist upon. The refusal of it was therefore erroneous, notwithstanding the substitute for it given by the court.

We have not deemed it necessary to consider or decide the question presented by the first exception, relating to the admissibility of certain testimony therein set out, because it is not probable, upon a future trial, that the appellants will find themselves in a predicament like the one which they now ask to be relieved from.

Nor do we feel at liberty upon this appeal to express any opinion in regard to the necessity of a conviction of the master before the slave can assert his freedom, so fully discussed upon the appellee's cross-appeal, because it is a point not presented by this record in such a way as would warrant us in deciding it.

Judgment reversed and *procedendo* awarded.

Upon the appeal by Barley, the same judge delivered the following opinion of this court:

This is a cross-appeal, and a motion is made by the appellees to dismiss it.

Upon the trial below, instructions were asked by both the plaintiffs and defendant, and each was denied by the court. The verdict and judgment were in favor of the defendant, and the plaintiffs appealed. The defendant thereupon also appealed.

Under such circumstances, we think the defendant can not sustain his appeal. He can not be said to be aggrieved by the result of the trial below, because the verdict and judgment were in his favor. If the instructions which he asked for had been granted, the result of the trial could not have been more favorable to his case.

Appeal dismissed.

DOMICILE, DEFINITION OF.—“In a strict and legal sense, that is properly the domicile of a person where he has his true, fixed, permanent home, and to which, whenever he is absent, he has the intention of returning (*animus revertendi*):” Story’s Conf. L., sec. 41, citing Dr. Lieber’s Encyc. Americ., art. Domicile; *Laneville v. Anderson*, 22 Eng. L. & Eq. 642. This definition is adopted by Bouvier, Law Dict., tit. Domicile; see also *Tanner v. King*, 11 La. 175; *Crawford v. Wilson*, 4 Barb. 505; *White v. Brown*, 1 Wall. jun. 217; *Horne v. Horne*, 9 Ired. L. 99; *Haviston v. Haviston*, 27 Miss. 704. Wharton gives the following definition: “Domicile is a residence acquired as a final abode. To constitute it, there must be—1. Residence, actual or inchoate; 2. The non-existence of any intention to make a domicile elsewhere.” Conf. L., sec. 21. Phillimore, upon the authority of American cases (which he declares to have been more successful in this matter than any other), defines domicile to be “a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time:” Phillim. Inter. L. 44, citing *Guier v. O’Daniel*, 1 Binn. 349, note; *Elbers v. United Ins. Co.*, 16 Johns. 128; *The Francis*, 8 Cranch, 363; *Johnson v. Sundry Articles of Mdse.*, 3 Pet. Cond. Rep. 171; see also *The Venus*, 8 Cranch, 253; *Gilman v. Gilman*, 52 Me. 173; *Putnam v. Johnson*, 10 Mass. 488; *Abington v. Inhabitants of N. Bridgewater*, 23 Pick. 170; *Rue High, Appellant*, 2 Dougl. 515; *Chaine v. Wilson*, 8 Abb. Pr. 78; *Hegeman v. Fox*, 31 Barb. 475; *Chaine v. Wilson*, 1 Bosw. 673; S. C., 1 Bradf. 69; *Lee v. Stanley*, 9 How. Pr. 272; *Brown v. Ashbough*, 40 Id. 263; *Haggart v. Morgan*, 1 Seld. 422; *In Matter of Catherine Roberts’ Will*, 8 Paige, 519; *In Matter of Thompson*, 1 Wend. 43; *State v. Collector of Bordentown*, 32 N. J. L. 192; *Greene v. Windham*, 13 Me. 225.

DOMICILE, DIFFERENCE BETWEEN, AND "RESIDENCE," "DWELLING-PLACE," "HOME," "INHABITANCY," ETC.—In *Frost v. Brisbin*, 32 Am. Dec. 423, it was held by the court that a person might have a domicile in one state and a residence in another. In the note to this case, collecting authorities, the same rule is laid down; see also *Matter of Thompson*, 1 Wend. 43. So in *In re Watson*, 15 Fed. Rep. 511, the court held that the word "residence" was not synonymous with "domicile" within the meaning of the bankruptcy law. Those terms have been nearly always held to be different, within the meaning of the statute giving a remedy by attachment against non-residents: *Alston v. Newcomer*, 42 Miss. 187; *Risewick v. Davis*, 19 Md. 82; *Bartlett v. The City of New York*, 5 Sandf. 44; *Burrill v. Jewett*, 2 Robt. 701. In *Inhabitants of Jefferson v. Inhabitants of Washington*, 19 Me. 293, the words "dwelling-place" and "home" were held to be not synonymous with "domicile." While they mean some permanent abode or residence, with intention to remain, their meaning is more restricted and limited. A home, unlike a domicile, does not continue until another is gained; it may be abandoned, and the individual cease to have a home. See also *Briggs v. Inhabitants of Rochester*, 16 Gray, 340, where the court say: "It has been repeatedly said by this and other courts that the terms 'domicile,' 'inhabitaney,' and 'residence' have not precisely the same meaning;" and the court cites *Lyman v. Fiske*, 17 Pick. 234; *Thorndyke v. Boston*, 1 Met. 245; *Foster v. Hall*, 4 Humph. 348; *Warren v. Thomaston*, 43 Me. 412. The case of *In the Matter of Wrigley*, 8 Wend. 140, holds to the same effect; but in *Crawford v. Wilson*, 4 Barb. 522, the court say: "From the various definitions of the terms 'residence,' 'inhabitaney,' and 'domicile,' and the decisions in regard to them, I think we can deduce the proposition that the terms 'legal residence' or 'inhabitaney' and 'domicile' mean the same thing." So in *Inhabitants of Warren v. Inhabitants of Thomaston*, 43 Me. 406; *Chariton Co. v. Moberly*, 59 Mo. 238; and *Hart v. Horn*, 4 Kan. 238, those terms were held to be synonymous.

DOMICILE, WHERE, OF PERSONS IN PARTICULAR RELATIONS.—*Domicile of Wife.*—"English and American cases are equally explicit in declaring that on marriage the wife's domicile merges in that of the husband:" Whart. Conf. L., sec. 43, citing *Bremer v. Freeman*, 1 Dea. & Sw. 212; *Yelverton v. Yelverton*, 1 Sw. & Tr. 574; *Dalhousie v. Dzieduzyki*, 37 How. Pr. 208; *Hackettstown Bank v. Mitchell*, 4 Dutch. 516; *Angier v. Angier*, 7 Phila. 305; *Smith v. Moorhead*, 6 Jones Eq. 366; *McAfee v. Kentucky Univ.*, 7 Bush, 135; *Williams v. Saunders*, 5 Coldw. 60; *Sanderson v. Ralston*, 20 La. Ann. 312; *Dow v. Gould*, 31 Cal. 629; 4 Phillim. Inter. L. 60; see also *Davis v. Davis*, 30 Ill. 180; *Green v. Green*, 11 Pick. 410; *Hannaberry v. Hannaberry*, 29 Ala. 719. So Story lays it down as his fourth rule for determining the domicile of a person, that "a married woman follows the domicile of her husband:" Conf. L., sec. 46; see also *Colburn v. Holland*, 14 Rich. Eq. 176; *Pennsylvania v. Ravend*, 21 How. 103; *Burnham v. Rangeley*, 1 Woodb. & M. 7. If, however, the relations between husband and wife become adverse, her domicile may become different from his, at least to allow her to file a bill for divorce: *Harding v. Alden*, 9 Greenl. 140; *Harteau v. Harteau*, 14 Pick. 187; *Irby v. Wilson*, 1 Dev. & B. Eq. 568; *Cheever v. Wilson*, 9 Wall. 108; *Brown v. Lynch*, 2 Bradf. 214; 4 Phillim. Inter. L., c. 8, p. 61.

Domicile of Infant.—At the birth of a legitimate child it unquestionably takes the domicile of its father: Whart. Conf. L., sec. 35, citing *Somerville v. Somerville*, 5 Ves. 786; *Udny v. Udny*, L.R., 1 Sc. App., 441; *Dalhousie v. McDonall*, 7 Cl. & Fin. 817. See also 2 Hagg. Ecc. 405; *Desobats v. Berquier*, 1 Binn. 349; Story's Conf. L., sec. 46; Dicey on Domicile, 72. The

domicile by birth of a minor continues to be his domicile till changed, nor can he generally acquire a domicile different from that of his parents during his minority: *Desesbats v. Berquier*, 1 Binn. 349; *Hiestand v. Kuns*, 8 Blackf. 345; *Warren v. Hofer*, 13 Ind. 167; *Wheeler v. Burrows*, 18 Id. 14; *Parsonsfeld v. Kennebunkport*, 4 Greenl. 43; *Lacy v. Williams*, 27 Mo. 280; *Hart v. Lindsey*, 17 N. H. 235; S. C., 43 Am. Dec. 597; *Brown v. Lynch*, 2 Bradf. 214; 4 Phillim. Inter. L., c. 9, p. 74. This principle is forcibly recognized in *In Matter of Bye*, 2 Daly, 528, where the court say: "Every human being has a fixed domicile; originally it is the place where his parents lived at the time of his birth, which continues until he has acquired another." But an illegitimate child takes the domicile of its mother: Story's Conf. L., sec. 46; Whart. Conf. L., sec. 37; 4 Phillim. Inter. L. 90; Wright's Trusts, 2 Kay & J. 595; Dicey on Domicile, 72; *Houlton v. Loubec*, 35 Me. 411; *Blackstone v. Seekonk*, 8 Cush. 75.

Residence of Corporation.: See *Wood v. Hartford Fire Ins. Co.*, 33 Am. Dec. 395, and note, where it is stated that for jurisdictional purposes the residence of a corporation is at its chief place of business. In this note the subject is treated at length.

Ambassadors.—"The most important class of public officers whom the law exempts from the presumption of domicile attaching to continuous residence in a particular place are ambassadors. No position of international law is better established than that which preserves to the ambassador in a foreign state the domicile of the country which he represents:" 4 Phillim. Inter. L., c. 11, p. 122; Dicey on Domicile, 137; Phillim., secs. 171-178; Story's Conf. L., sec. 48; Whart. Conf. L., sec. 49.

DOMICILE OF PERSON, HOW ASCERTAINED AND HOW CHANGED.—It is well settled that "no person can at any time be without a domicile:" Dicey on Domicile, rule 2, p. 59, citing *Udny v. Udny*, L. R., 1 Sc. App., 441; *Bell v. Kennedy*, Id. 307. See also *Abington v. North Bridgewater*, 23 Pick. 170; *Rue High, Appellant*, 2 Dougl. 523. This domicile, so universally possessed by every one, is in the first instance the domicile of origin, which is retained until another one is acquired, and the one thus acquired is in like manner retained: *Abington v. North Bridgewater*, 23 Pick. 177; *Glover v. Glover*, 18 Ala. 367; *State v. Hallet*, 8 Id. 161; *Burnham v. Rangelry*, 1 Woodb. & M. 7; *Barrett v. Williford*, 25 Ga. 151; *Rue High, Appellant*, 2 Dougl. 523; *Wilson v. Terry*, 11 Allen, 206; *Nixon v. Palmer*, 10 Barb. 175; *Lowry v. Bradley*, 39 Am. Dec. 142; *Hood's Estate*, 21 Pa. St. 106; *Layne v. Pardee*, 2 Swan, 232; *Thorndyke v. City of Boston*, 1 Met. 242; *Kilburn v. Bennett*, 3 Id. 199; *Graham v. Public Adm'r*, 4 Bradf. 127. The question then arises, How is this change effected? By what rules is it to be determined? It is well settled that the act of residence does not alone constitute the domicile of a party, but it is the fact of residence, coupled with the intention of remaining permanently, which constitutes it: *McKowen v. McGuire*, 15 La. Ann. 637; *Leach v. Pillsbury*, 15 N. H. 137; *State v. Daniels*, 44 Id. 383; *Boardman v. House*, 18 Wend. 512; *Ely v. Lyon*, 18 Id. 644; *Frost v. Brisbin*, 19 Id. 11; *Graham v. Public Adm'r*, 4 Bradf. 127; *Hegeman v. Fox*, 31 Barb. 475; *Henrietta v. Oxford*, 2 Ohio St. 32; *McIntyre v. Chappel*, 4 Tex. 187; *Smith v. Croom*, 7 Fla. 81; *Brewer v. Linnaeus*, 36 Me. 428; *Sears v. City of Boston*, 1 Met. 250; *Sackett's Case*, 1 Mass. 58; *Abington v. Boston*, 4 Id. 312; *Commonwealth v. Walker*, Id. 556; *Granby v. Amherst*, 7 Id. 1; *Lincoln v. Hapgood*, 11 Id. 350; *Williams v. Whiting*, Id. 424; *Lyman v. Fiske*, 28 Am. Dec. 293; *Lowry v. Bradley*, 39 Id. 142; *Harvard College v. Gore*, 5 Pick. 370; *Littlefield v. Brooks*, 50 Me.

475; *Gravillon v. Richards*, 33 Am. Dec. 563; *Hart v. Lindsey*, 43 Id. 597; *Greene v. Windham*, 13 Me. 225; *White v. White*, 3 Head, 404; *Phillips v. Kingfield*, 36 Am. Dec. 761; *Layne v. Pardee*, 2 Swan, 232; Dicey on Domicile, 76, citing *Bell v. Kennedy*, L. R., 1 Sc. App., 307; *Attorney General v. Kent*, 31 L. J. Eq. 391; Whart. Confl. L., sec. 58; *Hart v. Horn*, 4 Kan. 232; *Hallowell v. Saco*, 5 Me. 143; *Richmond v. Vassalborough*, Id. 396.

With regard to the character of the residence, which, as we have seen above, is one of the necessary factors in the acquisition of a domicile, Dicey says: "The residence which goes to constitute domicile certainly need not be long in point of time. 'If the intention of permanently residing in a place exists, a residence in pursuance of that intention, however short, will establish a domicile.'" Domicile, 76, citing *Bell v. Kennedy*, L. R., 1 Sc. App., 307; and further: "The residence must be in pursuance of or influenced by the intention. This characteristic, however, in common with other qualities which are generally ascribed to residence, concerns not the physical fact of residence, but the mental fact of the choice, purpose, or intention to reside (*animus manendi*):" Id. The same author, in speaking of the intention (which is the second requisite of a perfect change of domicile), says: "There exists no authoritative definition of the *animus manendi* necessary to the acquisition of a domicile of choice, but there are four points as to its character which deserve notice:" Id. 77. And he then (on pp. 77 et seq.) proceeds to lay them down as follows: "1. The intention must amount to a purpose or choice; 2. The intention must be an intention to reside permanently, or for an indefinite period; 3. The intention must be an intention of abandoning, i. e., of ceasing to reside permanently in the former domicile; 4. The intention need not be an intention to change allegiance." See also Whart. Confl. L., sec. 66; *Horne v. Horne*, 9 Ired. L. 99.

An inhabitant of one state does not acquire a domicile in another by going there to seek employment with the intention of only remaining there in case he should be successful: *Ross v. Ross*, 103 Mass. 575. So in *Smith v. The People*, 44 Ill. 23, it appeared that the defendant, who was an attorney, left Illinois, where he was domiciled, with his family, in August, 1865, and moved into Tennessee. Before going to Tennessee he repeatedly declared that he was going as an experiment; if the people were such that he could remain with satisfaction, then he would not return. He also refused to sell his Illinois reports, saying that if he should return he would need them. He returned to Illinois in March, 1866, and it was held that he had not lost his domicile there. Where a person, about two months before an election, sells out his property and starts with his family for Texas, with the intention of remaining there if he can find a place to suit him, but upon arriving there he returns, without unloading his goods, to his former election precinct, he will not thereby lose his residence and right to vote: *City of Beardstown v. City of Virginia*, 81 Id. 541. The domicile of origin is not lost by very long absence, and mere doubt, even very strong doubt, of a real intention to return: *White v. Brown*, 1 Wall. jun. 217; *State v. Judge*, 13 Ala. 805; *Re Fight*, 39 Id. 452; *Love v. Cherry*, 24 Iowa, 204; *Risewick v. Davis*, 19 Md. 82; *Williams v. Roxbury*, 12 Gray, 21; *Clark v. Territory*, 1 Wash. T. 82; *Gravillon v. Richards*, 33 Am. Dec. 563. If a person leave the place of his domicile temporarily, or for a particular purpose, and does not take up a permanent residence elsewhere, he does not change his domicile: *Crawford v. Wilson*, 4 Barb. 505.

But in order to acquire a new domicile, it is not necessary that the person

should reside in the place in question, with the purpose of making it his permanent home and residence, but it is sufficient if he reside there with the intention to remain for an indefinite period of time, and without any fixed and certain purpose to return to his former place of abode: *Whitney v. Inhabitants of Sherborn*, 12 Allen, 111; *Dicey on Domicile*, 80; *Jennison v. Hapgood*, 10 Pick. 77. "If a person has actually removed to another place with an intention of remaining there for an indefinite time, and as a place of fixed present domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period:" *Story's Conf. L.*, sec. 46. The above rule, as laid down by Story, was quoted and followed in the principal case, and has been so reaffirmed in a number of cases: See *Rue High, Appellant*, 2 Dougl. 524; *State v. Frest*, 4 Harr. (Del.) 559; *State v. De Casinova*, 1 Tex. 407; *State v. Groom*, 10 Iowa, 309; *Frost v. Brisbin*, 32 Am. Dec. 423.

If a man having a family be domiciled in any town within the commonwealth, he will not be considered as having changed his domicile by removing into another town, until he removes his family: *Williams v. Whiting*, 11 Mass. 424; *Waterborough v. Newfield*, 8 Greenl. 203. So the residence of the wife is evidence of the domicile of her husband, but it is not conclusive; if he has abandoned her, or she has abandoned him, he may establish his domicile elsewhere: *Greene v. Windham*, 13 Me. 225. While a person is in transit from one place of residence to another, the former continues his domicile: *Bulkley v. Inhabitants of Williamstown*, 3 Gray, 495; *Littlefield v. Brooks*, 50 Me. 476; *Clark v. Likens*, 2 Dutch. 207; *Islam v. Gibbons*, 1 Bradf. 69.

ARMSTRONG v. RISTEAU.

[5 MARYLAND, 256.]

ADVERSE POSSESSION FOR TWENTY YEARS will enable a plaintiff to maintain ejectment against a defendant having the paper title who has ousted him.

UNDER STATUTE OF JAMES I., c. 16, UNINTERRUPTED POSSESSION OF LAND for twenty years is like a descent at common law, and tolls the entry of the person having right.

CASE OF DOE v. READE, 8 EAST, 353, does not sustain the proposition to which it is cited in 2 Arch. N. P. 318.

COMMON OPINION AMONG EMINENT JURISTS may be appealed to as evidence of what the law was considered to be, on a point to which there are no cases to the contrary.

TO ACQUIRE TITLE BY POSSESSION, all cases unite that it should be adverse, exclusive, and continuous, but differ as to the tests by which its character is to be determined.

IN CASE OF MIXED POSSESSION, actual inclosure is necessary in order to defeat the title of the real owner by adverse possession.

PARTY BEING ENTITLED TO POSSESSION OF TRACT OF LAND in possession of part thereof is in possession of all, and his possession can not be barred by adding together the different possessions of the defendant at long intervals, so as to make out twenty years. So where several persons without title enter upon land in succession, the last can not tack the possession of his predecessors to his own in order to make out said term.

ADMISSIONS BY DEFENDANT'S GRANTOR THAT PREMISES IN CONTROVERSY BELONGED TO PLAINTIFF, and that plaintiff and said grantor had agreed upon a boundary as now claimed by plaintiff, may be evidence of boundary and possession, but they can not prove title in plaintiff by possession, when he has admitted that defendant's deed covers said disputed premises.

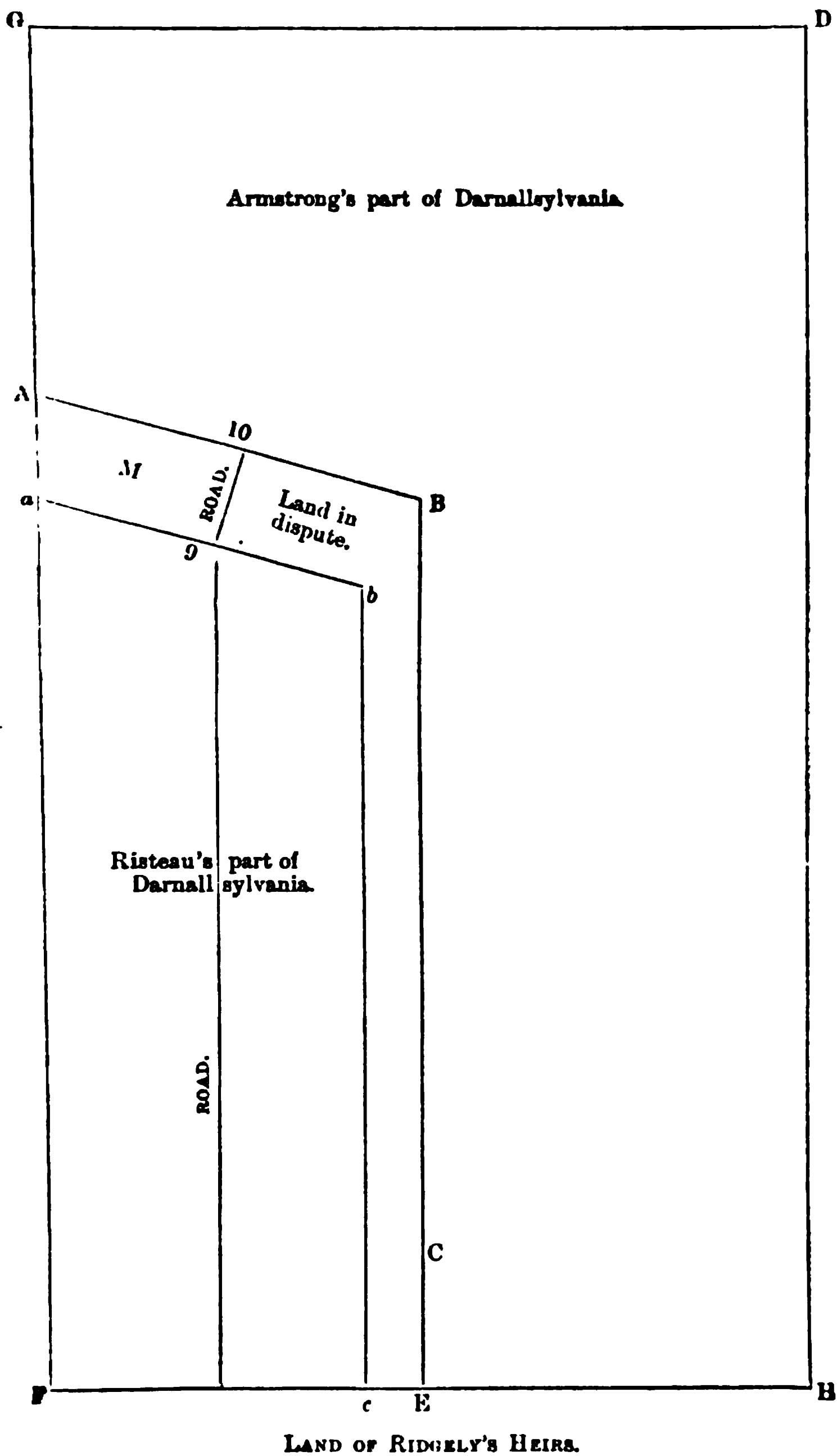
FENCES ON THREE SIDES OF OBLONG OR SQUARE PIECE OF LAND is not such an inclosure as would constitute adverse possession, where such inclosure is necessary.

ADVERSE POSSESSION, IN ORDER TO CONSTITUTE TITLE, must be a hostile invasion of another's rights. If the acts of ownership relied upon were committed with the consent of the real owner, no title by possession can be founded upon them.

IN ORDER TO RAISE PRESUMPTION OF DEED FROM POSSESSION, such possession should be adverse, exclusive, and continuous, and under claim of title. The finding of these facts should be left to the jury.

WHERE ANY OBJECT, AS FENCE, IS LOCATED ON THE PLATS, and known to the witness, he may give evidence of any cutting on, or user or cultivation of, the land in any particular direction from the fence or other object located; so a witness sworn at the survey may give evidence of the general possession of the land, etc., without any particular location of the places.

ACTION of ejectment, brought by the appellee against the appellant for part of a tract of land known as "Darnallsylvania." Defendants pleaded the general issue, and defense on warrant. Both parties claimed under Hercules Courtenay, who owned the land many years ago. The following is a copy of the plat used at the trial, and referred to in the opinion of the court and in the instructions. F G D H is the outer line of Darnallsylvania. The disputed premises are bounded as follows: Commencing at B, called "black B," near which a cherry tree is located; running thence to E; thence to c, called "red C;" thence to b, called "red B;" thence to 9, to 10, to place of beginning. The first line of Darnallsylvania is admitted to begin at D. The second line is admitted to begin at G, called "black G," at which is placed a "stone and hickory." a, called "red A," is the end of the second line of Armstrong's title deed, and the beginning of the third. A, called "black A," is the point at which, as is alleged, RistEAU and Chambers planted a stone and agreed upon as the beginning of the division line between them. There is a fence from A to B, from B to C, and from 9 to 10, at which latter place is situated "Armstrong's gate," through which a road passes into Armstrong's land. RistEAU's land is not entirely inclosed, being open from F to c, where it adjoins the land of Ridgely's heirs. There is no fence from 9 to b, where the disputed premises joins other woodland in the possession of



RistEAU. Plaintiff asked three instructions, to the following effect: 1. If they (the jury) believe that the plaintiff and his grantors have had exclusive possession of the land for twenty years; that he exercised rights of property over the land openly, with the knowledge and consent of those under whom defendant claims; that defendant always recognized the fence cornering at the cherry tree as the division between them; that Chambers, under whom defendant claims, together with plaintiff, planted a stone at "black A," on the second line of Darnallsylvania, as the commencement of their boundary line—then plaintiff should recover. 2. If plaintiff had been in adverse possession for twenty years prior to the commencement of this suit, then he is entitled to recover. 3. If they find the facts as stated in the first instruction, then they should presume the existence of a deed. On the part of defendant, the following instructions were asked: 1. If the jury find, from the deeds, wills, etc., introduced in evidence by the defendant, that the second line of defendant's land begins at "black G," runs thence to "red A," thence to "red B," thence to "red C," plaintiff is not entitled to recover. 2. This is an objection to the admission of evidence of cutting, etc., as the places where the cutting is alleged to have been done is not pointed out upon the plats, nor were they pointed out to the surveyor at the time of the survey. 3. This, in substance, charges that unless the disputed premises were inclosed, no acts of *sparsim*, cutting, etc., amounts to such exclusive possession as will entitle plaintiff to recover. The prayers of plaintiff were all given, and those of defendant refused, to which he excepted. Verdict for plaintiff, and defendant appealed.

Mayer and Dulany, for the appellant.

Campbell and Nelson, for the appellee.

By Court, TUCK, J. The appellee sued the appellant for the recovery of part of a tract of land called "Darnallsylvania." At one time this whole tract belonged to Hercules Courtenay, who was the father of the appellee's wife, and who, in the year 1807, sold three hundred and thirty-one acres thereof to Daniel Chambers, under whom the appellant claims, by a devise to his son, Harry W. Chambers, and subsequent conveyances.

At the trial below, the appellee offered the will of Hercules Courtenay and other documentary evidence, from which it appears that he devised his "dwelling plantation, consisting of parts of Good Hope, Gray's Inspection, and Darnallsylvania,"

to his wife for life, and at her death to his son, John S. Courtenay. In 1820 the latter conveyed his interest to his mother, who, by her will, dated in 1824 and proved in 1826, directed the lands to be sold and the proceeds to be divided between her said son and Mrs. Risteau. It does not appear that any sale was made under the will, nor in what manner J. S. Courtenay became sole owner of the dwelling plantation of his father; but in 1827 he devised it to Mrs. Risteau and her infant son, and to the survivor, and the heirs and assigns of such survivor. The land in controversy is not mentioned in any of these instruments offered on the part of the appellee. It does not appear that Mrs. Risteau was the owner of the whole of her father's estate at the time this action was commenced.

The plaintiff proved various acts of ownership on the part of H. Courtenay, his widow and himself, by cutting wood, timber, and rails for thirty or forty years before the trial; and that certain fences on the north and east of the land in dispute were standing at the time of the trial where they were forty years before, which were considered the division fences between these farms; that Chambers, the elder, had several times said that the land in dispute belonged to Mr. Courtenay, and that about the year 1832, H. W. Chambers, from whom the defendant purchased, and the appellee had planted a stone at the beginning of one of the lines, located by the appellee, as a dividing line between them. There is no proof of possession by John S. Courtenay, nor of the circumstances and manner of the appellee's taking possession of the disputed land. It is woodland, and has fences on three sides, but has none on the south; on that side it adjoins woodland of the Courtenay estate in possession of the appellee, but this is not entirely inclosed, being open on the line between it and the lands of Ridgely's heirs. The *locus in quo*, part of the Courtenay estate, and Ridgely's land, constitute a considerable body of land, uncultivated and not inclosed, and have so remained for many years. A road passes through the land from the south to the north, leading into Armstrong's possessions through a gate in the fence, laid down by the appellee as the dividing line between the parties. By whom this gate was put there does not appear, but the witnesses speak of it as Armstrong's gate.

On the part of the defendant below it was proved that Courtenay sold and conveyed to Chambers, the elder, in 1807, three hundred and thirty-one acres, which are included in the deed to the appellant, the lines of which embrace the lot in contro-

versy, if located according to his pretensions. He also proved that he and those under whom he claims have, from the time of Daniel Chambers, the grantee of Courtenay, resided on, occupied, used, and cultivated all the land within the limits of the defendant's deed, except that portion thereof which is claimed by the plaintiff.

After having been in the possession of the appellee, and of those under whom he claims, adversely for more than twenty years, as he alleges, the appellant obtained possession by extending his fences according to the lines of his deed, as he claims they should be located. Various locations were made, most of which are disputed by counter-locations, but the explanations of the surveyor show that the parties agree as to the beginning, and first and second lines of the whole tract of Darnallsylvania.

No question arises on paper title. The prayers of the appellee rest his right to recover on adverse possession by himself and those under whom he claims. And two propositions have been relied on by the appellee's counsel which are supposed to embrace the points chiefly in controversy. These are: 1 That twenty years adverse possession will enable a plaintiff to maintain ejectment against a defendant having the paper title, who has ousted the plaintiff; 2. That the plaintiff below has proved such a possession as entitles him to recover in this action.

If the first of these propositions were to be settled according to the English authorities alone, we suppose that its correctness could scarcely be questioned. More than a century and a half ago it was decided by Lord Holt that "if A. has possession of land for more than twenty years uninterrupted, and then B. gains possession, upon which A. brings ejectment, though A. is plaintiff, yet his possession for twenty years will be a good title for him as well as if A. had then been in possession, because possession for twenty years, by virtue of the statute of James I., c. 16, is like a descent at common law, which tolls the entry:" *Stocker v. Berny*, 1 *Ld. Raym.* 741, reported in 2 *Salk.* 421, as *Stokes v. Berry*. The same principle is stated in *Bull. N. P.* 103, and the reason assigned, "that by the statute, twenty years possession tolls the entry of the person having right, and consequently, though the very right be in the defendant, yet he can not justify his ejecting the plaintiff."

In *Taylor v. Horde*, 1 *Burr.* 60, Lord Mansfield, in speaking of adverse possession by a defendant in ejectment, said: "Twenty years adverse possession is a positive title in the defendant; it is

not a bar to the action or remedy of the plaintiff only, but it takes away his right of possession." And subsequently, in the case of *Denn v. Barnard*, 2 Cowp. 597, this eminent jurist applied the same doctrine where the plaintiff in ejectment was relying on a title by possession alone. See also *Barwick v. Thompson*, 7 T. R. 492.

The counsel for the appellant, however, contend that this doctrine does not prevail against a defendant holding the legal title, and they rely on 2 Arch. N. P. 318, 50 Law Lib. 308, where it is said: "If a party against whom the twenty years have run obtain quiet possession of the land, he is then in as of his old right, and may set up his right and title as a defense to any ejectment that may be brought against him, in the same manner as if he had never been out of possession;" for which the author cites *Doe v. Reade*, 8 East, 353. That case does not sustain this position. There the plaintiff never had any possession of the premises. She set up a claim under a former possessor, between whom and herself there was no privity. The defendant, with title, had entered into a vacant possession on the death of the last occupant. "The court all agreed that the defendant, being lawfully in possession, might defend himself upon his title, though twenty years had run against him before he took possession, such possession not being the possession of the lessor of the plaintiff." The words last quoted, but omitted by Archbold, clearly show that the defendant could not have resisted the title of the plaintiff if she had had twenty years adverse possession before the entry of the defendant. There are other cases in England in which the decision of Lord Holt is referred to as authority on this point.

We have not been referred to any decision in Maryland in which a plaintiff has recovered on such a title, but there are several cases in which the court, in stating the general doctrines of the law of ejectment, has assumed that an adversary possession for more than twenty years is a positive title on which a plaintiff may recover. And in the arguments of counsel in the numerous land cases to be found in our reports, there are frequent recognitions of the validity of such titles when relied on by plaintiffs. We mention this as pertinent to the present inquiry, because, in the absence of adjudged cases, the common opinion among eminent jurists, whose learning and experience were so often employed in ejectment causes under the provincial and state governments, may, we think, be appealed to as evidence of what the law was then considered to be on a point

upon which there are no cases to the contrary: *Ram on Legal Judgments*, 12; *Grant v. Gunner*, 1 Taunt. 448; *Casey v. Inloes*, 1 Gill, 500 [39 Am. Dec. 658].

In the case of *Plummer v. Lane*, 4 Har. & M. 72 [1 Am. Dec. 395], the court said: "The plaintiff in ejectment must show a grant of the land for which the action is brought, and a regular title from the grantee; or seisin of the land, and a dying seised of the person under whom the lessor derives his title, and a regular title from the person dying seised, or twenty years uninterrupted and exclusive possession of the land." And in the case of *Wood v. Grundy*, 3 Har. & J. 19, the court were of opinion that the plaintiff was not entitled to recover, "there being no title deduced from the patentee, etc., and there being no possession proved sufficient to entitle the plaintiff to recover in ejectment without showing title." See also *Hutchins v. Erickson*, 1 Har. & M. 339; *Helms v. Howard*, 2 Id. 88, 89; *Davidson v. Beatty*, 3 Id. 621. This view of the question is also taken by the late Judge Dorsey, in his *Lectures on Ejectment*, p. 43, where he says: "Twenty years adversary possession not only tolls the right of entry, but enables the party in possession to maintain ejectment;" and "where the claimant does not come within the exceptions of the statute of James, it [the adverse possession] is a bar against all the world;" for which he refers to the case above cited from Lord Raymond, showing that Lord Holt's construction of the statute was understood by him to be the law in this state. See same book, pages 56, 57.

With these opinions before us, we might rest the decision of the proposition under consideration upon the authority of those by whom the law has been thus expounded, more especially as the labor and research of counsel (and of the court) have not produced a single case in which the opposite doctrine has been maintained: 2 Gill, 201 [miscited]. But as the counsel for the appellant contend that the statute was designed for the protection of defendants and to quiet possession so long only as they are held; and as this is the first case in this court in which the point has been directly presented, its importance is a sufficient reason for briefly alluding to what has been ruled elsewhere in courts of high authority. Looking to the reason on which the law of limitations is applied, we can not give to the statute the restricted operation suggested by the counsel. It is true that it does protect possessions against plaintiffs showing title, but this effect is produced because what the law deems a perfect possession has continued during the whole time prescribed by

the statute, and thus given the title to the party who is so possessed. A presumption arises that the rights of the real owners have been extinguished or surrendered, else they would not have acquiesced so long in the possession and use of the property. The right of entry is thereby taken away, and the right to the possession attaches to the possession itself, making a complete title in the occupant: *Abell v. Harris*, 11 Gill & J. 371; *Casey v. Inloes*, 1 Gill, 497 [39 Am. Dec. 658]; Angell on Limitations, 396. The argument of the appellant is fully met by the following cases in which the question was expressly before the court.

In Pennsylvania, whose statute of limitations, according to Judge Washington, *Potts v. Gilbert*, 3 Wash. 478, is substantially the same as that of 21 James, Tilghman, C. J., held that the right of possession is acquired by twenty-one years possession, and that this right is not only sufficient to support a defense, but is a positive title under which one may recover as plaintiff in ejectment. "This," he said, "was the very point decided in *Stokes v. Berry*, 2 Salk. 421." So in New York it is said to be "unquestionably the true rule, and every legal presumption, every consideration of policy, requires that such evidence of right should be taken to be conclusive:" *Jackson v. Deiffendorf*, 3 Johns. 267. In that case a party who had held possession for thirty-eight years was turned out by a writ of possession under a judgment by default at suit of the defendants, who were plaintiffs in a former action. The questions were, whether that possession gave title to recover in ejectment, and whether the judgment by default in the former suit was a bar to the action. Both points were ruled with the plaintiff. The same doctrine was affirmed in *Jackson v. Oltz*, 8 Wend. 440, where it was held that a possession for more than twenty years, by the plaintiff, had ripened into a title, and that he might recover, although the paper title was not in him. See also *Day v. Alverson*, 9 Wend. 223.

There are cases to the same effect in some of the other state courts, to which we deem it unnecessary to refer, concluding our views in affirmance of the first proposition, by referring to the opinion of Mr. Justice Washington, in *Holtzapple v. Phillibaum*, 4 Wash. 367, 368, who held it to be unquestionable law that an adverse possession in the defendant for a length of time, which will prevent a plaintiff from recovering in ejectment, will also give to the plaintiff who has had such a possession a right upon which he may recover; and that to defeat this right when asserted and proved, the adverse party must show either a

suit brought, or an entry made within the time which the law prescribes. To the same effect, see the opinion of Thompson, J., in *Jackson v. Porter*, 1 Paine, 457; Angell on Limitations, c. 31.

We are next to consider whether the plaintiff had had such possession of the premises in dispute as entitled him to maintain this ejectment. There is great diversity among the cases on the subject of adverse possession. While they agree that it must be adversary, exclusive, and continuous, they differ as to the tests by which its character is to be determined. In most of the cases actual inclosure has been held to be indispensable; but in some this has not been considered important where the nature and position of the property and the mode of using it were such as to afford manifest evidence to all persons of an intent to claim the land by adversary possession. *Ewing v. Burnet*, 11 Pet. 41, is a case of this kind. See also 2 Smith's Lead. Cas. 413-415. This absence of uniformity is to be observed, generally if not always, where the possession has been held by one party only, and not by both as a mixed possession. In the latter case, whatever the law may be elsewhere, there can be no doubt that it has been long settled in Maryland that actual inclosure is necessary to defeat the title of the real owner. In a recent case in the late court of appeals, in which the subject is discussed, it is said: "The general principle is now too well settled to require authorities in its support that a *possessio pedis* of part of a tract of land by him who is legally entitled to the entirety carries with it the possession to the extent of his legal rights; and no wrong-doer can, in contemplation of law, by entry or the exercise of acts of ownership thereon, acquire the possession of any part thereof without actual inclosure, or ouster, actual or presumptive:" *Casey v. Inloes*, 1 Gill, 496 [39 Am. Dec. 658]. And at page 503: "That the title of the rightful owner, in a case of mixed possession, can not be barred by adding together the different possessions and acts of the defendant, at long intervals in point of time, so as to make out twenty years, is a principle also well settled. Upon every discontinuance of the possession of the wrong-doer, by operation of law the possession of the rightful owner is restored, and nothing short of actual, adverse, and continuous possession for twenty years can destroy his rights or vest a title in the wrong-doer:" *Cheney v. Ringgold*, 2 Har. & J. 87; *Hall v. Gittings*, Id. 112; *Hammond v. Ridgely*, 5 Id. 264 [9 Am. Dec. 522]. And where different persons enter upon land, in

succession, without title, the last possessor can not tack the possession of his predecessors to his own so as to make out continuity of possession sufficient to bar the entry of the owner. The possession of one can not be the possession of the other, because the moment the first occupant quits the possession, the legal possession of the owner is restored and the entry of the next occupant constitutes him a new disseisor. There is no privity between them: *Polls v. Gilbert*, 3 Wash. 479. There is a diversity among the cases on this last point, but we think that the correct rule is laid down by Judge Washington, and that it is within the reason of the doctrine stated by the court of appeals, *Casey v. Inloes*, 1 Gill, 503 [39 Am. Dec. 658], above quoted.

That the lot in controversy is within the lines of Armstrong's deed according to this record, can not be controverted. The beginning and the first and second lines of the whole tract of Darnallsylvania are admitted to be correctly located on the plats. The appellant's title papers call for and are located precisely as are the first and second lines of the whole tract, as far as they profess to run together. The effect of this admission, then, is to establish the beginning of Armstrong's third line so far south on the second line of Darnallsylvania as to locate the land in dispute north of his third line; because, assuming, as the locations admit, that the beginning of the appellant's second course is at the stone and hickory ("black G"), it is impossible to run his second line according to his title papers without arriving at "red A," which is south of the woods claimed by the plaintiff, and consequently within the lines of defendant's deed.

It is said, however, and the evidence shows, that some of those under whom the appellant claims admitted that this lot belonged to Courtenay, and that RistEAU and Chambers had planted a boundary and agreed upon the line as now claimed by the appellee. These admissions may be evidence of boundary, and of the true location of the third line of appellant's deed and of possession, but they certainly can not be relied on to prove title in the appellee by possession, so long as the admissions above mentioned are on the record: 1 Greenl. Ev., sec. 203. If these locations had been disputed, and a question submitted to the jury as to the correct running of those lines of the whole tract for which the appellant's deeds call, the fact of planting the boundary, and the admissions of Chambers, might have been of importance, as tending to show that the land in controversy was not within the lines of his deeds, and that the doctrines of mixed

possession did not apply. But we do not perceive how the jury could have found for the plaintiff, on any such question, on the evidence before them, inasmuch as they were concluded by the admissions of the parties, and must have found the beginning and first and second lines of the whole tract, and consequently, the defendant's third line as located by him: *Hughes v. Howard*, 3 Har. & J. 9; *Wilson v. Inloes*, 6 Gill, 160, 164. By the prayers as submitted by the plaintiff, the jury were at liberty to have found for him, although they might have been satisfied from all the evidence that the land was embraced within the lines of the appellant's deed, and was a case of mixed possession.

It was insisted on the part of the appellee that the nature and location of the property and of the fences, and the conduct of the claimants, were such as to have given to the plaintiff and to those under whom he claims the exclusive and adversary possession, although there was no fence on the south side, on the principle that whatever necessarily excluded the defendant and his predecessors from the use and enjoyment of the *locus in quo* would have the same effect in law in vesting title in the possessor as if it had been entirely inclosed. Without saying how far such a state of things would avail the appellee if the appellant had not shown title to the land, we think that the argument contravenes the Maryland authorities on such questions as that before us, and that these must prevail. It is true, as suggested by the counsel, that at page 504 of 1 Gill, *Casey v. Inloes*, the court used the words "actual, adverse, and continuous," without mentioning inclosures; but we can not suppose that they meant to decide that possession without inclosure was sufficient, when they had employed that expression on page 500, and referred to the cases in which it had been held to be indispensable to give title to a wrong-doer. Some of these cases were nearly if not quite as favorable in circumstances for the party claiming by possession as the present is to the plaintiff. If the position of these parties were reversed on the docket, the case would be not very dissimilar from that of *Cheney v. Ringgold*, 2 Har. & J. 87. The plaintiff there, as Armstrong here, was in possession by inclosure of a part of his land. The defendant there was in possession of a part of the plaintiff's land by inclosure, as RistEAU is of the lot M, lying west of the land in dispute. The defendant proved that he and those under whom he claimed by descent (but the appellee here shows no title or privity between himself and the former occupants of the land) had lived

on the land, using the parts exterior to his inclosures ever since 1762, by cutting wood, rails, and other timber thereon, for the use and purposes of the farm; and for more than twenty-seven years had been in the actual possession, by cultivation and inclosure, of a part of the land, claiming title to the whole. Yet the court said that the plaintiff was not barred, because it was a case of mixed possession as to all the land not within the defendant's inclosures, though he was barred as to the land inclosed and cultivated for more than twenty years.

It does not appear by whom these fences were erected; it is certain that the appellee did not put them there. Their erection was no act on his part showing an intention to claim the property. He used the property as he found it, in the manner spoken of by the witnesses. If this was a fence of the former owners of Armstrong's land, it can not be called an adverse possession by any person outside of the fence, because that would be to make a man turn himself out of possession of his own land, when he may place his fences on any part of his property without thereby abandoning his title to what may be left out. In *Casey v. Inloes*, *supra*, the court said that a single line of fence did not make an adverse possession, it was an inclosure or occupation only of what the fence covered. And in *Tilton v. Hunter*, 24 Me. 29, it was held that a single line of fence that did not appear to complete an inclosure, although it ran across the land of the real owner, and cut off one part from the other (one part being the disputed land), did not amount to a disseisin at common law. Why, then, should fences on three sides of a square or oblong piece of land have a more conclusive effect, more especially when in one of them there is a gate through which the owner has access to the land, and consequently, is not necessarily "excluded from enjoying or participating in the advantages derivable from the possession?" *Davidson v. Beatty*, 3 Har. & M. 622. If this had been a possession fence surrounding the land, such as that mentioned in *Casey v. Inloes*, 1 Gill, 500 [39 Am. Dec. 658], it would not have been sufficient, and we think that such a mode of taking possession would have been more definite and notorious, as evincive of a hostile invasion of the owner's rights, than were all the facts on which the appellee founded his prayers.

The appellee's counsel relied in argument upon the case of *Smith v. McAllister*, 14 Barb. 434, which does in its general doctrines sustain his views; but it is to be observed that the facts of that case come within the principle of mixed possessions as

recognized in this state. The statement shows that "the land in dispute had for over twenty-five years been inclosed within the defendant's inclosure, and occupied and used by him and those under whom he claimed, and tilled and cultivated in common with their other lands." But if this had not been so we should not upon this one authority of a sister state overrule the decisions of our own highest tribunal, requiring actual inclosure to vest title in a party claiming by possession alone in cases of mixed possession. The case of *Brooke v. Neale*, Dorsey's Ejectment, 40, also relied upon by the appellee, we think does not apply to the one before us. We have shown in *Hoye v. Swan*, 5 Md. 237 (at the present term), that the defendant in that case was in possession, claiming under deeds for the very land in dispute, when the right of the plaintiff accrued, and therefore he occupied a very different attitude from that of the appellee here.

For these reasons, we think that the prayers of the appellee should have been rejected, and that the third of the appellant should have been granted. The first and third of the plaintiff also claimed a verdict for him if the jury should find that the acts mentioned were exercised openly and with the knowledge and consent of the adjoining proprietors, under whom the defendant claims, and that they had recognized the fence cornering at the cherry tree as a division fence between them and those under whom the plaintiff claims. If the acts of ownership relied upon were committed with the consent of the real owners of the land, no title by possession could be founded on them, as assumed by the first prayer, no matter how openly they were done. One of the elements of such a title is, that the possession must be a hostile invasion of another's rights: *Kirk v. Smith*, 9 Wheat. 241, 288. If there was consent on the part of the owner, the entry for the purpose of doing the act was not tortious: *Gwynn v. Jones*, 2 Gill & J. 173. And as to the presumption of a deed, insisted upon by the third prayer, the law requires that the possession should be actual, adverse, exclusive, and continuous, and under claim of title, the finding of which facts are not left to the jury: *Casey v. Inloes*, 1 Gill, 505 [39 Am. Dec. 658]. These prayers also authorized the jury to find for the plaintiff upon being satisfied that the fence cornering at the cherry tree had been recognized as the division line, not noticing the fences on the east and west of the lot, without which they had no guide, but were left to conjecture as to the extent of the plaintiff's claim and right to recover.

The first prayer on the part of the appellant presents a different question. It claims a verdict for the defendant below, upon the hypothesis that the real owner of land, though not in actual possession of any part, may maintain his title, as against a wrongdoer, claiming by a possession commenced, continued, and accompanied by acts of ownership, as proved in this cause, provided the land in dispute be not inclosed. It is not necessary here to discuss this question, because it was as directly presented in the case of *Hoye v. Swan*, *supra*, in which we decided that as between the real owner and one claiming by possession alone, and showing no title, there is no difference in law upon the question of title by adversary possession, whether the owner be in possession of any part of his land or not. In both, the title by possession prevails only to the extent of actual inclosures. The prayer, we think, should have been granted, for the reasons assigned in that case.

The appellant's second prayer, as to the admissibility of evidence of *sparsim* cuttings, was properly rejected. Where an object, as a fence, is located on the plats and known to the witness, he may give evidence of any cutting on, or user or cultivation of, the land, in any particular direction from the fence or other object located. And a witness sworn on the survey may give evidence at the trial of the general possession of the land located on the plat, and of acts of ownership generally over the same, without any particular location of the places where the acts of ownership were performed: *Ridgely v. Ogle*, 4 Har. & M. 128, note; *Bowley v. Deady*, December term, 1829, cited in *Dorsey's Ejectment*, 62.

Reference was made in argument to a supposed mistake in locating some of the lines of the whole tract, under a commission to mark and bound; but this commission is not in evidence, and the testimony of the witnesses is not sufficiently definite to enable us to determine in what the mistake, if any, consisted. We decline expressing any opinion on this part of the case.

Judgment reversed, and *procedendo* awarded.

The appellant subsequently moved the court to refuse a *procedendo* in this case, which motion was overruled.

ADVERSE POSSESSION.—The entry of the owner of land is barred only by an actual, continued, visible, notorious, distinct, and hostile possession for twenty-one years: *Union Canal Co. v. Young*, 30 Am. Dec. 212, and note collecting prior cases; *Wright v. Guier*, 36 Id. 103, and note; *Wafer v. Pratt*, 36 Id. 681; *Bailey v. Carleton*, 37 Id. 191; *Overton's Heirs v. Davisson*, 42 Id. 544; *Robertson v. Robertson*, 38 Id. 148; *Williams v. Buchanan*, 35 Id. 760; *Hoye v.*

Furman, 44 Id. 129; and notes to those cases. Several successive possessions can not be "tacked" to make a continuous adverse possession, where there is no privity of estate, or connection of title between the parties successively entering on the land: *Melvin v. Proprietors etc.*, 38 Id. 384, and note; *Casey's Lessee v. Inloes*, 39 Id. 658; *Kilburn v. Adams*, 39 Id. 754.

POSSESSION OF PART IS POSSESSION OF WHOLE, where there are conflicting grants, and the adverse claimant is not in possession of any portion: *Overton's Heirs v. Davisson*, 42 Am. Dec. 544.

THE PRINCIPAL CASE IS CITED in *Langley's Heirs v. Jones*, 26 Md. 474, to the point that where the same title paper is located by both parties in the same manner, covering the same ground, the location is binding upon both, and neither is allowed to dispute its correctness. In *Morrison v. Hammond*, 27 Id. 618, it is cited to the general proposition that the law upon the question of adverse possession is well settled by the previous decisions of the Maryland court of appeals. The court then proceed to say that "twenty years continuous, exclusive, adverse possession by actual inclosure, by the defendants or one of them, and those under whom they claim, will bar the action" (ejectment). See also *Beatty v. Mason*, 30 Md. 414, where it is cited to much the same point; in *Campbell v. Fletcher*, 37 Id. 434, it is cited to the point that twenty years adverse possession will enable plaintiff to maintain ejectment.

C A S E S
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

RAND v. MATHER.

[11 CUSHING, 1.]

AGREEMENT VOID IN PART UNDER STATUTE OF FRAUDS is not necessarily void *in toto*.

IF PART OF AGREEMENT IS CONTRARY TO STATUTE, this does not avoid or annul other parts of the agreement which are separable from the bad part, and not founded upon it, unless the statute expressly or by necessary implication declares the whole void.

AWARD BAD IN PART MAY ALSO BE GOOD IN PART. *Loomis v. Newhall*, 15 Pick. 159, overruled.

PROMISE TO CONTRACTOR BY STRANGER TO CONTRACT that if the former will proceed to complete certain work the latter will pay him for the whole, is void as to the work done before such promise was made, but valid with respect to the work done afterwards.

ASSUMPSIT for one hundred and seventy-nine dollars for work and materials. The writ embraced the common counts, and an account was annexed, showing the work done and the materials furnished. The general issue was pleaded. The work had been commenced on a contract between plaintiffs and John Whistan, under which the former was to paint certain houses which the latter was building on the lands of the defendant, Dr. Mather. After painting to the extent of about forty-five dollars had been done the plaintiffs became alarmed about their pay, as Whistan had taken the poor debtors' oath. There was evidence tending to prove that at this stage of the work the defendant told the plaintiffs to go on and he (defendant) would see them paid; that they, relying on this, proceeded to complete the work. The court instructed the jury to find for defendant, which they did.

R. H. Dana, jun., for the plaintiffs.

A. Wheeler and H. C. Hutchins, for the defendant.

By Court, METCALF, J. The instruction given to the jury, that the evidence offered by the plaintiffs would not authorize the finding of a verdict for them, must have proceeded upon the ground that an agreement which is void in part by the statute of frauds is void *in toto*. And so it was decided in *Loomis v. Newhall*, 15 Pick. 159, on the authority of *Lexington v. Clarke*, 2 Vent. 223, and *Chater v. Beckett*, 7 T. R. 201. The question, therefore, is, whether that decision was right. And we are all of opinion that it was wrong, and must be overruled. The grounds of this opinion are briefly stated in *Irvine v. Stone*, 6 Cush. 508. And though what was there said on this point was not essential to the decision of that case, and would have been omitted or modified if *Loomis v. Newhall*, *supra*, had been then remembered, yet it was the result of a considerate examination of the principles which are uniformly applied in analogous cases, and of the latest adjudications on the precise point now in judgment. A renewed examination of those principles and adjudications has confirmed the opinion then expressed.

It is unnecessary to refer to any adjudged case besides that of *Wood v. Benson*, 2 Crompt. & J. 94, and S. C., 2 Tyrw. 93, which is not distinguishable from the case before us. In that case, the previous decisions in *Lexington v. Clarke* and *Chater v. Beckett*, *supra*, and *Thomas v. Williams*, 10 Barn. & Cress. 664, were all considered by the court of exchequer, and were held to have been rightly decided upon the ground of a variance between the declaration and the proof. In the first and third of those cases there was only a single count in the declaration, namely, a special count setting forth the whole agreement alleged to have been made by the defendant. In the language of Bayley, B., in *Wood v. Benson*, *supra*, "the declaration in each of those cases stated the entire promise, as well that part which was void as that which was good. I think, therefore, that these cases are to be supported on the principle of failure of proof of the contract stated in the declaration; but that they do not establish that if you can separate the good part from the bad, you may not enforce such part of the contract as is good." In the case of *Chater v. Beckett*, *supra*, there was, in addition to the special count on the entire promise, a count for money paid by the plaintiff to the use of the defendant. But it was held, without reference to the statute of frauds, that the evidence did not sup-

port that count. Lord Lyndhurst said, in *Wood v. Benson*, *supra*: "The case of *Thomas v. Williams* may, as it appears to me, be supported. Part of the contract in that case was void by the statute of frauds. The declaration stated the entire contract, including that part of it which was void; and therefore the contract, as stated in the declaration, was not proved. The same observation applies to *Lexington v. Clarke* and *Chater v. Beckett*; and I have no disposition to complain of these decisions, because in none of those cases does there appear to have been any count upon which the plaintiff could recover."

In *Wood v. Benson*, *supra*, there was not only a special count on the entire agreement, but also a count for goods sold and delivered. And it was decided that, on this last count, the plaintiff was entitled to recover for the goods sold and delivered after the defendant's promise to pay for them. In the case at bar there is no special count on the defendant's agreement, but the general *indebitatus* counts only are inserted in the declaration. And a plaintiff may recover on such counts after the terms of a special agreement are performed by him. This has been the settled law ever since the decision in *Gordon v. Martin*, Fitz.-G. 302.

If there had not been a general as well as a special count in *Loomis v. Newhall*, *supra*, the decision in that case might have been sustained by the authorities on which it was made. There would have been a variance or failure of proof. But as there was a general count, the case was erroneously decided.

The analogies of the law confirm our views of this case, and the decision in *Wood v. Benson*, *supra*.

In early times it was held that an award if bad in part was wholly bad. But it has long been settled, on satisfactory grounds, that the general validity of an award is not impaired, though some things which the arbitrator appoints to be done are impossible, unreasonable, or unlawful, unless, "by the particular defect, a mutuality of interest and advantage, appearing evidently to have been intended by the arbitrator to be given, is destroyed; or where the general substance of the award and the real justice of the case are affected:" Caldwell on Arbitration, 1st Am. ed., 120; *Hartnell v. Hill*, For. 79, 80.

In contracts which are not affected by statute provisions, the doctrine always has been, as it was announced by Hutton, J., in *Bishop of Chester v. Freeland*, Ley, 79, to wit, "at the common law, when a good thing and a void thing are put together

in one self-same grant, the same law shall make such construction that the grant shall be good for that which is good and void for that which is void: See *Newman v. Newman*, 4 Mau. & Sel. 66; *Bank of Australasia v. Breillat*, 6 Moo. P. C. C. 152.

It is said in many books that if any part of an agreement is contrary to a statute the whole is void, though it is otherwise where part only is contrary to the rules of the common law; that "a statute is like a tyrant; where he comes he makes all void." But this never was true of statutes generally. Twisden, J., in *Maleverer v. Redshaw*, 1 Mod. 35, stated that he had heard Lord Hobart say that the statute of 23 Hen. VI. was "like a tyrant," etc. That statute prescribed the form of a bail bond, and made in express terms "any obligation in other form void." And in *Norton v. Simmes*, Hob. 14 (to which case Twisden, J., doubtless referred), it was resolved by Lord Hobart and his associates that "if a sheriff will take a bond for a point against that law," 23 Hen. VI., "and also for a due debt, the whole bond is void; for the letter of the statute is so; for a statute is a strict law. But the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand:" See *Kerrison v. Cole*, 8 East, 236, 237.

On principle, and according to numerous modern adjudications, the true doctrine is this: If any part of an agreement is valid, it will avail *pro tanto*, though another part of it may be prohibited by statute; provided the statute does not, either expressly or by necessary implication, render the whole void; and provided furthermore, that the sound part can be separated from the unsound, and be enforced without injustice to the defendant. See opinion of Gibbs, C. J., in *Doe v. Pitcher*, 6 Taunt. 369; *Mouys v. Leake*, 8 T. R. 411; *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 Id. 87; *Howe v. Synge*, 15 Id. 440; *Greenwood v. Bishop of London*, 5 Taunt. 727. In the application of this doctrine, Chancellor Kent says: "If the part which is good depends upon that which is bad, the whole is void; and so I take the rule to be, if any part of the consideration be *malum in se*, or the good and the void consideration be so mixed or the contract so entire that there can be no apportionment:" 2 Kent's Com., 6th ed., 467. The application of this doctrine to cases affected by the statute of frauds will be found in *Mayfield v. Wadsley*, 3 Barn. & Cress. 357; *Ex parte Littlejohn*, 3 Mont. D. & De G. 182; *Wood v. Benson*, before cited—where one part of the agreement was held to be separable from the other; and in *Cooke v. Toombs*, 2 Anst. 420; *Lea v.*

Barber, Id. 425, note; *Mechelen v. Wallace*, 7 Ad. & El. 49; *Vaughan v. Hancock*, 3 C. B. 766; *Irvine v. Stone*, 6 Cush. 508—where it was held that the different parts of the agreement could not be separated.

New trial ordered.

DOCTRINE OF PRINCIPAL CASE, THAT CONTRACT OR WRITING VOID IN PART IS NOT NECESSARILY VOID IN TOTO ON THAT ACCOUNT, is now well established in Massachusetts. Thus in *Page v. Monks*, 5 Gray, 495, the court say: "A contract is not necessarily void, or wholly inoperative, because it consists in part of promises and engagements for the breach or disregarding of which the statute neither affords nor allows any action at law. In such cases, whether any of those promises or engagements can be enforced must depend upon the manner and extent of their connection and combination with the rest. If the contract is in its nature entire, and its parts are incapable of separation or division, then, though some of its stipulations are not if others of them are affected by the statute, no action can be brought or maintained upon it. But it is otherwise if the parts are severable." The principal case is cited and followed in *Page v. Monks*, *supra*; and in *Eastern R. R. Co. v. Benedict*, 15 Gray, 292; *Allen v. Leonard*, 16 Id. 203; *Haynes v. Nice*, 100 Mass. 329; *Friend v. Pettingill*, 116 Id. 517; and in *Amesbury v. Bowditch Mutual Fire Ins. Co.*, 6 Gray, 607, it was said that "the same principles are applicable to a by-law. Where a by-law is entire, each part having a general influence over the rest, if one part is void the whole is void; but where a by-law consists of several distinct and independent parts, though one or more of them is void, the rest are valid. And this rule is applicable to the different clauses of the same by-law; for where it consists of several particulars, it is, to all purposes, as several by-laws, though the provisions are thrown together under the form of one."

Entire contract is void when it is founded upon an indivisible consideration, part of which is illegal: *Filson v. Himes*, 47 Am. Dec. 422, in note to which other cases in this series on this point are cited.

WOOD v. GAMBLE.

[11 CUSHING, 8.]

ACTION IS NOT ABATED BY SUBSEQUENT COMMENCEMENT and prosecution to judgment in the courts of a foreign nation of another action based on the same cause.

ASSUMPSIT commenced in November, 1849. Afterwards the plaintiffs sued the defendants on the same cause of action in Canada, where they resided, and there recovered judgment. This judgment, though unsatisfied, was relied upon as a defense to this action.

H. Jewell, for the plaintiff.

C. P. Curtis, jun., for the defendants.

By Court, DEWEY, J. At the time of the institution of this suit the plaintiffs had a good cause of action. The only ground of defense is that the plaintiffs have, by their subsequent acts in instituting suits in the court of queen's bench in Canada, and entering up judgment thereon, abated their suits here. The counsel for the plaintiffs has fully presented the cases bearing on the question of merger of a simple contract by force of a foreign judgment. These cases have generally arisen in suits instituted after the judgment was obtained. The English doctrine seems formerly to have been that such foreign judgments did not merge the original cause of action; latterly, and especially in reference to the English colonial courts, they seem to have been treated as conclusive as domestic judgments. In our own court a strictly foreign judgment, as distinguished from the judgment of a court of a sister state, is treated as not conclusive, but as only *prima facie* evidence. But the present case is not an action brought upon a foreign judgment, or after such judgment had been recovered. This is the primary suit brought upon the original contract, and prior to the suit which is here set up in defense. The causes of action are certain promissory notes of hand. The only ground of defense is that of an abatement of the action by the proceedings subsequently instituted in the court in Canada.

Does such judgment in the second action have the effect to bar the plaintiff from further maintaining his action here? The case is one of a mere judgment in the subsequent suit without satisfaction. Had the same been paid to the plaintiffs, their receipt thereof would of course operate to defeat the present action, for payment would discharge the notes. But a mere foreign judgment, without satisfaction, has no such effect. Whether the pendency of the present action might have been successfully pleaded in abatement to the suit in the queen's bench in Canada, where the second action was brought, would be for that court to decide. However that may be, such second suit was no bar to the present, which had been previously commenced. Judgment may properly be entered here. This will not entitle the plaintiff to receive payment or satisfaction of both judgments. The payment of either will furnish a ground for an *audita querela*, or other proper process to stay all further proceedings in the other.

The case of two judgments on the same note is not without precedent. It is so in the case of joint and several promisors when they are sued severally. So also in the case of a maker

and indorser of such note. They only authorize the creditor to enforce one payment of the demand. Until the debt is paid by some one, the creditor may enforce all his remedies and obtain judgment thereon.

Judgment for the plaintiffs.

FOREIGN JUDGMENT AS MERGER OF CAUSE OF ACTION.—In section 220 of Freeman on Judgments, the principal case is cited to sustain the proposition that a foreign judgment is not such a merger of the original cause of action as to preclude the plaintiff from again recovering thereon; but it is clear that the principal case does not necessarily maintain this proposition. In fact, the court seem, by design, to avoid expressing any opinion on this question, except, perhaps, to intimate that the most recent English adjudications had enhanced the effect of foreign judgments. The decision in the principal case is based solely on the fact that the foreign judgment brought forward as a merger of the cause of action was rendered in an action commenced subsequently to the action in which such judgment was pleaded. In our opinion, this circumstance was wholly immaterial, for where two or more actions are pending between the same parties, based upon the same cause, a judgment in either generally precludes a recovery in the others, because by such judgment the original cause of action is drowned or merged. It no longer has any life or vitality. If there exist any exception to this rule, it must be in those jurisdictions where foreign judgments are not regarded as of any greater dignity than the causes of action out of which they arose, and therefore as incapable of drowning or merging such causes.

WYER v. DORCHESTER AND MILTON BANK.

[11 CUSHING, 51.]

BURDEN OF PROOF IN ACTION ON BANK BILL SHOWN TO HAVE BEEN STOLEN is not on the plaintiff to show that he obtained it fairly and under such circumstances as entitle him to maintain an action on it. The burden is on the defendant to show that plaintiff did not so receive it.

ASSUMPSIT on a bank bill issued by defendant. It had been presented, and payment refused on the ground that it had been stolen from defendant. The bill had been given plaintiff by Mumford & Cannon of Philadelphia, for whose benefit the action was brought. There was no evidence to show how or for what consideration they had obtained the bill. The court directed a verdict for defendant.

H. C. Hutchins, for the plaintiff.

J. L. English, for the defendant.

By Court, METCALF, J. As these exceptions are framed, the single question in the case is, whether the burden is on the

plaintiff to prove that he or that Mumford & Cannon paid a good and sufficient consideration for the bank bill in suit. But the decision of this narrow question would not necessarily decide the merits of the case; inasmuch as the plaintiff, or those for whom he brings this suit, may have paid a good and sufficient consideration for the bill, and yet have taken it from the thief, knowing that it had been stolen; in which case they would not be entitled to recover. The counsel have, therefore, argued a broader question, namely, whether the burden is on the holder of a bank bill which is shown to have been stolen to prove that he obtained it fairly and under such circumstances as enable him to maintain an action on it. And we are now to decide whether the rule of evidence which is applied to promissory notes and bills of exchange that are stolen or otherwise fraudulently put into circulation is applicable to bank bills that are circulated after they have been stolen. In the case of such bills of exchange and promissory notes, the burden is on the holder to prove that he took them in good faith: *Munroe v. Cooper*, 5 Pick. 412; *Bailey v. Bidwell*, 13 Mee. & W. 76; *Mills v. Barber*, 2 Gale, 5, 7. According to recent decisions, that burden is very light: See *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 491 [57 Am. Dec. 120]. But we are of opinion that the rule of evidence is different in the case of a bank bill.

In *Miller v. Race*, 1 Burr. 452, the plaintiff took a stolen bank note in the usual course of his business, for a full and valuable consideration, and without any notice that it had been stolen, and presented it at the bank for payment. A clerk of the bank refused to pay it or to redeliver it; and the holder brought an action of trover against him. No question was raised about the burden of proof, or about the necessity of the plaintiff's proving how he obtained the note. But the case was decided in his favor, on grounds which, in our judgment, are nearly decisive of the question of burden of proof. Lord Mansfield said the action was well brought, and would lie against the defendant upon the general course of business, and from the consequences to trade and commerce, which would be much incommoded by a contrary determination. And he said bank notes "are not goods, nor securities, nor documents for debts, nor are so esteemed; but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes." "A bank note is constantly and universally, both at home and abroad, treated as money, as

cash, and paid and received as such; and it is necessary, for the purposes of commerce, that their currency should be established and secured."

All this is as true of bank notes in Massachusetts as in England. They are passed from hand to hand as money, in all the business, small and great, of every-day life, and can not ordinarily be identified by any one who receives or passes them. Whereas bills of exchange and promissory notes that are negotiated, and given or received, whether in payment or as collateral security, can always be identified, and can ordinarily be traced through their whole course of circulation. And the receiving and the disposing of them are as much a subject of entry in the books of traders and of banks as any other of their transactions. It is therefore no hardship on the holders of such paper to require of them, in a case where dishonesty has been practiced on him who is called on for payment, to show how they obtained it; because, from the nature of the case, they can readily do it, if they have conformed to the usual course of business. But it is totally different in the case of bank bills, which pass as money. For, as before stated, they can not in most cases be identified. In entering receipts and payments on account-books, neither the number nor denomination of bank bills, nor the bank that issued them, would be noted, unless for some special reason in a special case.

We are therefore of opinion that the burden is not on the plaintiff in this case to show how he acquired the bill in suit, but that the burden is on the defendant to show that he or Mumford & Cannon received it under such circumstances as to prevent the maintenance of this action. As it is admitted that the plaintiff has no personal interest in the bill, but acts merely as agent for Mumford & Cannon, there can be no doubt that this action might be defeated by proof that they received the bill dishonestly.

Our views of the law of this case are supported by the opinions of distinguished judges expressed in several cases. In *Solomons v. The Bank of England*, 13 East, 135, note, which was an action of trover for a bank note that had been obtained by means of a forged draft, Buller, J., said: "It is certainly enough, in the case of a bank note, to show possession, until the title is affected by evidence on the other side." Grose, J., said: "Bank notes are to be considered as cash, and the holder has a right, in the first instance, to say that he will not tell how he came by it; but on the other hand, the bank may take upon them the *onus*

of fixing fraud upon the holder." In *King v. Milsom*, 2 Camp. 5, Lord Ellenborough said he must presume that the holder of a bank note which had been lost was a *bona fide* holder for a valuable consideration, and that it lay on the loser to impeach the holder's title. And in *De la Chaumette v. The Bank of England*, 2 Barn. & Adol. 385, which was an action of trover by the holder of a bank note that had been stolen, Parke, J., said: "Whoever was the bearer of the note may sue, unless it be shown that the note was not obtained *bona fide* and for valuable consideration." The supreme court of Louisiana expressed a decided opinion, if they did not authoritatively adjudge, that the rule of evidence which holds in cases of bills of exchange and promissory notes is not to be applied to the case of a bank note: *Louisiana Bank v. Bank of the United States*, 9 Mart. 398.

In the present case, there was no evidence as to the circumstances under which Mumford & Cannon obtained the bank bill; and if the suit had been in their names, they would not have been bound to give any evidence on that point, unless the defendants had first shown some reasonable ground for doubting their honesty. As the plaintiff sues for them, and not for his own benefit, he was not bound to show, in the first instance, how they acquired the bill.

New trial ordered.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 560; *Spooner v. Holmes*, 102 Mass. 508; *Clark v. Thayer*, 105 Id. 218.

HUNT v. ROYLANCE. BADNALL v. ROYLANCE.

[11 CUSHING, 117.]

PARTY'S DECLARATIONS ARE NOT ADMISSIBLE IN HIS FAVOR, though accompanied by acts in harmony therewith, to rebut or annul the effect of contrary declarations made by him at other times.

SECONDARY EVIDENCE OF CONTENTS OF BOOKS OF ACCOUNT is not admissible, unless the absence of the books is accounted for.

ACTIONS against Roylance, Briggs, and Strobbridge, as partners. The latter denied his liability, and claimed not to be a partner with the others. To prove the case against him, his declarations to two clerks of the firm, and to others, were given in evidence. To rebut this, the defendant, against the objections of plaintiffs, was allowed to show that on one occasion he refused to sign a lease, and stated as his reason for the refusal that he was not a

partner; and at another time, when asked whether he was a member of the firm, he said he was not. Neither of these exculpatory declarations was made in the presence of plaintiffs, nor of either of their witnesses. The defendant was also allowed, against objection, to prove the entries on certain books, the books not being present nor accounted for. Verdicts for defendant in both cases.

A. H. Fiske, for the plaintiffs.

J. Atkinson, for the defendant.

By Court, BIGELOW, J. The single question at issue between the parties in these actions was, whether one B. H. Strobridge, one of the defendants, was a copartner with the two other defendants, Briggs and Roylance, at the time the notes declared on were given and signed with the names of Roylance, Briggs & Company. To maintain this issue on their part, the plaintiffs offered in evidence the declarations of said Strobridge, made on several different occasions to two clerks in the employment of the firm. For the purpose of rebutting and controlling this evidence, the defendant Strobridge offered evidence to prove his own declarations on the subject of the partnership and his connection therewith, made on other occasions than those testified to in behalf of the plaintiffs, and when neither the plaintiffs nor their witnesses were present. These statements were objected to by the plaintiffs, but were admitted, and this forms one of the principal grounds of the exceptions in the present case. It seems to us that this evidence was incompetent, on the familiar principle that a party can not be allowed to prove his own declarations in support of his own case. The defendant had a right to prove any statements of his own, which made part of those offered in evidence by the plaintiffs. He could explain and contradict any conversation or declaration which had been first proved against him by the plaintiffs, because such evidence tended directly and legitimately to control the case made out against him by the plaintiffs. But beyond this he could not go. His own admissions, not offered in evidence against him, had no legal tendency to control the case proved on the other side. To show that a man denied being a member of a copartnership to A. to-day does not prove or in any way tend to show that he did not admit that he was a member of the firm to B. yesterday. It is simply an admission in his own favor, having no bearing on the admission proved against him. Nor does it make such testimony any the more competent or relevant because a

party seeks to couple it with independent acts and circumstances not proved on the other side, and which of themselves, unaccompanied by the declarations of a party, would not tend to prove the matter in issue. This would be a mere evasion of the rule. The fact or circumstance, being of itself immaterial, can not be made important or relevant by adding to it the declaration of a party in his own favor. These familiar principles dispose of several of the exceptions taken at the trial to the admission of evidence. The declarations of the defendant at the time a lease of the store was brought to him to be signed, the conversation relative to the parties to a writ made in the name of the firm, and the conversation with the witness concerning the insolvency of the firm were all incompetent, and should have been excluded.

The testimony relative to the manner of keeping the accounts between Strobridge and the firm, in the books, and the fact that a credit of a certain sum, as a salary to said Strobridge, was entered on said books, were also incompetent, because they were attempted to be proved by secondary evidence. The defendant should either have produced the books or accounted for their absence.

The remaining objections taken to the admission of evidence are not tenable. They had a legitimate tendency to disprove and control the facts and declarations relied on by the plaintiffs, and were rightly admitted.

Exceptions sustained.

THE PRINCIPAL CASE IS APPROVED in *Hall v. Holden*, 116 Mass. 176, where it was held that evidence showing that a town at one time voted to repay certain money could not be rebutted by proving that it subsequently rescinded that vote.

DICKINSON v. WILLIAMS.

[11 CUSHING, 258.]

ONE TENANT IN COMMON MAY MAINTAIN ACTION AT LAW AGAINST HIS CO-TENANT to recover the latter's proportion of moneys paid by the former to remove an incumbrance on their common property which they had assumed on their purchase thereof.

OPEN AND MUTUAL ACCOUNT CURRENT EXISTS BETWEEN CO-TENANTS when there are various items of payments and receipts respecting their common estate, and hence the statute of limitations against either must be computed from the last charge in such account.

ACTION of contract. The parties were tenants in common. Plaintiff sought to recover one half of certain moneys paid out

by him, and also one half of certain sums received by defendant from rents, profits, and sales of the common property. In 1839 they had purchased a farm on which was a mortgage, which they agreed to pay. They afterwards agreed to sell off enough land to pay the mortgage. Sales were accordingly made, the greater part of the proceeds of which were received by defendant. The plaintiff was compelled to pay three thousand dollars and upwards in discharge of the mortgage, and in settling for some covenants of warranty contained in the joint deeds of plaintiff and defendant. It appeared that the defendant had from rents and sales received several thousand dollars more than he had paid out; that the incumbrances and other debts of the co-tenants had all been discharged, and they remained the owners of about one hundred and seventy acres of land. The first item of payment by plaintiff was of October 13, 1845; this action was begun February 20, 1852.

G. T. Davis, for the plaintiff.

G. D. Wells, for the defendant.

By Court, DEWEY, J. It is objected to the maintenance of the present action that the plaintiff's only remedy is by a bill in equity. This point is urged as one necessarily resulting from the relation of these parties as tenants in common of the real estate, in reference to which the plaintiff claims that the defendant is indebted to him for money paid out and expended for the common benefit, and also for his proportionate share of money received from sales of the common property. As between such parties, it is contended that *assumpsit* will not lie to recover a proportional part of any money that one party has received beyond his share from the sale or use of the common property, or for a proportional share of money advanced by one party to relieve the estate from a common burden which both were equally bound to remove. But this position, we think, can not be maintained. Numerous cases in our own reports hold the contrary doctrine. The cases of *Brigham v. Eveleth*, 9 Mass. 538, and *Jones v. Harraden*, Id. 540, note, cited in a note to the former case, are decisions that *indebitatus assumpsit* will lie by one tenant in common against another who has received more than his share of the profits of the common property. This form of action was allowed in *Miller v. Miller*, 7 Pick. 133 [19 Am. Dec. 264], and S. C., 9 Id. 34, to recover money due for the share of one tenant in common in a sale of trees standing on the common land. It was allowed in *Fanning v. Chadwick*, 3 Id. 426 [15

Am. Dec. 233], where Wilde, J., says: "When a plain, convenient, and adequate remedy may be had at law, a party ought not to be turned over to a court of equity." The revised statutes, c. 118, sec. 43, abolishing the action of account, gives a bill in equity only in cases "where it can not be conveniently and properly adjusted in an action of *assumpsit*." In *Munroe v. Luke*, 1 Met. 459, which was *assumpsit* by one tenant in common against his co-tenant to recover his share of rents, it was held that where it was a claim for money actually received by defendant, to which in some form the plaintiff has title, it can be conveniently settled in an action of *assumpsit*.

Money expended by the plaintiff to pay off a common incumbrance, necessary to be removed to discharge their joint covenants, must equally be the proper subject of an action of *assumpsit* by one tenant in common against his co-tenant. Even in the case of copartners, *assumpsit* has been held to lie if there are no outstanding demands against the partners or outstanding debts to be collected, so that the judgment to be rendered will be a final settlement between the parties: *Rockwell v. Wilder*, 4 Met. 556; *Bromley v. Kupfer*, 6 Pick. 179; *Williams v. Henshaw*, 11 Id. 79 [22 Am. Dec. 366]. The present case, if tested even by this rule, would be maintainable. This judgment, when rendered, will be a final settlement between the parties. The judgment will adjust all their former liabilities for moneys received and money advanced for the common benefit, and leaves each the holder of his interest in the land remaining unsold.

The claim of the plaintiff is not barred by the statute of limitations, the accounts existing between the parties being such as show "a mutual and open account current" within the decision of *Penniman v. Rotch*, 3 Met. 216.

Judgment for the plaintiff.

THAT ASSUMPSIT MAY BE MAINTAINED BY ONE TENANT IN COMMON AGAINST ANOTHER, whenever an action of account is authorized, has been repeatedly held in the courts of Massachusetts and in those of some of the other states: Freeman on Cotenancy and Partition, secs. 280-283, citing *Jones v. Harraden*, 9 Mass. 540; *Brigham v. Eveleth*, Id. 541; *Fanning v. Chadwick*, 15 Am. Dec. 233; *Miller v. Miller*, 19 Id. 264; *Moses v. Ross*, 41 Me. 360; *Munroe v. Luke*, 1 Met. 464; *Shephard v. Richards*, 2 Gray, 424; *Buck v. Spofford*, 40 Me. 328; *Gowen v. Shaw*, Id. 58; *Dyer v. Wilbur*, 48 Id. 287; *Fiquet v. Allison*, 12 Mich. 329; *Gillis v. McKinney*, 6 Watts & S. 78; *Borrell's Adm'r v. Borrell*, 33 Pa. St. 494. In New York the action is maintainable in some but not in all cases where plaintiff is entitled to an account: Freeman on Cotenancy and Partition, sec. 284; *Coles v. Coles*, 8 Am. Dec. 231. While in England and in some of the United States the

remedy of one co-tenant against another for moneys received by the latter or paid out for the benefit of their common property seems to be limited to an action of account: Freeman on Cotenancy and Partition, sec. 285.

WORCESTER BANK v. HARTFORD FIRE INS. CO.

[11 CUSHING, 265.]

WHERE POLICY OF INSURANCE DECLARES THAT IF ASSURED "SHALL MAKE ANY OTHER INSURANCE on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same indorsed in writing on this instrument or otherwise acknowledged by them in writing, this policy shall cease and have no further effect;" if the assured obtains further insurance, and does not have it indorsed on the policy or otherwise acknowledged in writing, the policy becomes void, though a memorandum of such additional insurance was exhibited to an agent of the company, who said he had entered it and would have it indorsed on the policy.

ACTION on insurance policy. The defendants relied on a condition in the policy, the substance of which is stated in the above syllabus. The plaintiffs showed that James Y. Smith was an agent of the defendants; that plaintiffs showed Smith a memorandum of the additional insurance; that the policy not being then present, no indorsement could be made upon it; that Smith assured plaintiffs that this would make no difference; that he would make a memorandum on the books, and this would answer every purpose. The judge instructed the jury that if notice of the additional insurance was given to an agent of the insurers authorized to receive such notice and make a record of it on the books, and if such agent informed the assured that his record of it on such books had the same effect as if entered on the policy, then plaintiffs had sufficiently complied with the conditions of the policy. Verdict for plaintiffs.

R. Newton, for the plaintiffs.

N. Woods, for the defendants.

By Court, METCALF, J. It is provided in the policy on which this action is brought that if the assured or his assigns "shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same indorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." After the making of this policy, the assured obtained other insurance on the same prop-

erty, but did not have the same indorsed on the policy or otherwise acknowledged by the defendants in writing. Yet the judge before whom the trial was had instructed the jury that if the facts were as testified by Holbrook and Smith, the assured had sufficiently complied with the foregoing provision in the policy. We are of opinion that this instruction was wrong, and that for this cause the verdict must be set aside: See *Forbes v. Agawam Mutual Fire Ins. Co.*, 9 Cush. 470.

A new trial in this court must be ordered, unless the plaintiffs elect to discontinue or to become nonsuit.

THE PRINCIPAL CASE MAY BE REGARDED AS AN EXTREME ONE. In no other, so far as we are aware, has an assured been held to so literal a compliance with the conditions of his policy. For this was not an instance where the claim of the assured rested on mere knowledge of the agent of the additional insurance. This knowledge had reached the agent not incidentally or casually, but had been imparted in an attempt of the assured to comply with his policy, and he had not rested content until the agent had assured him that what had been done would answer every purpose.

WITH RESPECT TO PROPOSITION THAT INSURER MAY EXACT WRITTEN NOTICE OF ADDITIONAL INSURANCE, and may stipulate that the policy shall be void unless assent to such further insurance is given in writing, the principal case has been frequently cited and followed in the court wherein it was decided: *Hale v. M. M. F. I. Co.*, 6 Gray, 173; *Kimball v. H. F. I. Co.*, 8 Id. 37; *Evans v. T. M. F. I. Co.*, 9 Allen, 351. And there are other decisions in harmony with it: *Couch v. City F. I. Co.*, 38 Conn. 181; *Deitz v. M. C. M. F. & L. I. Co.*, 38 Mo. 85; *Hutchinson v. W. I. Co.*, 21 Id. 97. But courts have taken judicial notice of the fact that policies of insurance are generally so impaired in their beneficial effects by manifold conditions, usually printed in the finest type, that they have generally sought to neutralize those conditions if possible. Especially is this true with conditions similar to that relied upon in the principal case. Notwithstanding this and similar conditions in policies, the courts have, in the main, enforced the legal maxim that notice to the agent is notice to the principal; and that the latter can not, where the former had notice, avoid a policy on the ground of additional insurance: *Fishbeck v. The Phoenix Ins. Co.*, 54 Cal. 422; *Carrugi v. A. F. I. Co.*, 40 Ga. 135; S. C., 40 Am. Rep. 567; *Ins. Co. v. McDowell*, 50 Ill. 120; *Cobb v. Ins. Co. of N. A.*, 11 Kan. 93; *National F. I. Co. v. Crane*, 16 Md. 260; *Hadley v. Ins. Co.*, 55 N. H. 110; *Ill. M. F. Ins. Co. v. Malloy*, 50 Ill. 420; *Van Bories v. U. L. F. & M. I. Co.*, 8 Bush, 133; *Hayward v. N. I. Co.*, 52 Mo. 181; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 196; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345; *Planters' M. Ins. Co. v. Lyons*, 38 Tex. 253; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *Farmers' Ins. Co. v. Taylor*, 73 Pa. St. 342; *Continental Ins. Co. v. Horton*, 28 Mich. 173; *American Central Ins. Co. v. McCrea*, 8 Lea, 513; S. C., 41 Am. Rep. 647.

The stipulation in the policy with respect to notice of other insurance usually includes both prior and subsequent insurance. When an insurance has already been effected, and this fact is known to the agent obtaining the second insurance at the time when he delivers the policy or collects the premium, there seems now to be almost a unanimity of judicial opinion that the

second policy can not be avoided because of such prior insurance, though the policy, on its face, declares that it shall be void unless the fact of such prior insurance is indorsed on such policy; for, having the requisite information, it is the duty of the insurer, or his agent, to make the indorsement, and he can not urge the omission of his own duty as a release from his obligation otherwise valid.

The other or additional insurance may be, and generally is, procured subsequently to the policy sought to be avoided thereby. In this event the circumstances constituting a waiver or an equitable estoppel are not always so clear or persuasive as when premium is received with notice of other insurance. But even in this contingency notice to the agent is notice to the principal, and the latter will continue bound if the circumstances indicate that the condition of the policy was waived, and especially if it appear that the assured has acted upon the notice given by him to the insurer or his agent, and has effected the additional insurance in the honest belief that it had been assented to. We believe the spirit of the more recent adjudications warrants the assertion that where an insurer or his agent is by the assured notified of a subsequent insurance, whether orally or in writing, the prior policy will continue in force unless the insurer thinks proper to cancel it on receiving such notice: *Carrugi v. A. F. I. Co.*, 40 Ga. 135; S. C., 40 Am. Rep. 567; *Cobb v. Ins. Co. of N. A.*, 11 Kan. 93; *Hadley v. Ins. Co.*, 55 N. H. 110; *National F. I. Co. v. Crane*, 16 Md. 260; *Ill. M. F. Ins. Co. v. Malloy*, 50 Ill. 420; *Van Bories v. U. L. F. & M. I. Co.*, 8 Bush, 133; *Hayward v. N. I. Co.*, 52 Mo. 181; *Pechner v. Phoenix Ins. Co.*, 65 N. Y. 196; *Webster v. Phoenix Ins. Co.*, 36 Wis. 67; *American Central Ins. Co. v. McCrea*, 8 Lea, 513; S. C., 41 Am. Rep. 647.

The insurer must be charged with knowledge that the object of effecting the second insurance is to obtain additional indemnity, not to destroy that which already existed. It is his privilege to object to such further insurance, and on account thereof to cancel his policy. If he does this, the assured is injured only by the loss of the unearned premium, and perhaps even this must be returned on canceling the policy. The assured, knowing that the first policy has been canceled, may seek and probably obtain other insurance in its stead, and be indemnified in case of loss. But if the original insurer makes no objection until after a loss occurs, it is clear that his silence or apparent acquiescence has caused the assured to rest in the conviction that he was indemnified from loss to the extent of both insurances; and having thus influenced the conduct and expectations of the assured, he is estopped from relying on the condition in his policy which his silence or acquiescence has seemed to waive.

HEALD v. DAVIS.

[11 CUSHING, 318.]

POSSESSION OF PROMISSORY NOTE BY ONE OF TWO OR MORE CO-PROMISORS does not raise the presumption as against his co-promisors that he paid the whole of it.

ASSUMPT. Defendant claimed a set-off of one hundred and fifty dollars, and to support it offered in evidence a note for three hundred dollars made by himself and plaintiff, and pay-

able to a person not a party to this action. There was no other evidence respecting the payment of the note. The court instructed the jury that the production of this note by defendant was not evidence that he had paid the whole of it. Verdict for plaintiff.

G. M. Brooks, for the plaintiff.

J. G. Abbott, for the defendant.

By Court, DEWEY, J. We do not question the correctness of the rule as stated in the cases of *McGee v. Prouty*, 9 Met. 547 [43 Am. Dec. 409], and *Baring v. Clark*, 19 Pick. 220, that when a promissory note or bill of exchange has been negotiated, and afterward comes into possession of one of the parties liable to pay it, such possession is *prima facie* evidence of payment by him. But this rule of law does not apply to a possession by one of two joint promisors in an action by him to recover of the other one half the amount thereof. In the former case the possession is only to be accounted for, in the absence of evidence in relation to it, by the fact of payment by the party holding it. Not so as between co-promisors. The possession by one of them is *prima facie* evidence of payment of the note by them or one of them; but inasmuch as the possession could not be by each individually, it would be found with one, although both had contributed equally to the payment. In other words, the possession by one does not, as against his co-promisor, raise that inference of exclusive payment by the holder that would arise where the note was held by an indorser or a surety or a sole promisor.

Exceptions overruled.

WALKER v. FURBUSH.

[11 CUSHING, 366.]

ACTION FOR USE AND OCCUPATION MAY BE MAINTAINED by landlord against a tenant who leaves the premises without giving due notice of his intention to quit.

ACTION for use and occupation of certain premises from October 1, 1851, to January 1, 1852. Defendant had been a tenant at will for several years, paying rent quarterly. He abandoned the property in September, 1851, without giving any notice of his intention to quit, and never occupied it afterwards. In Octo-

ber plaintiff went to the house and shut an open door. Judgment for plaintiff.

H. C. Hutchins, for plaintiff.

M. G. Cobb, for defendant.

By Court, METCALF, J. As the defendant was tenant at will of the plaintiff, and the rent reserved was payable quarterly, it was necessary for him, if he would determine the tenancy at will by notice, to give the plaintiff three months' notice in writing: R. S., c. 60, sec. 26. But he quitted the demised premises at the end of a quarter without giving the plaintiff any previous notice, and she has brought an action for use and occupation of those premises for the next quarter after they were so quitted. The single question before us is, whether such action can be maintained in such case.

There is some confusion in the books on the question whether by the English common law this action would lie. But by an act of parliament, statute of 11 Geo. II., c. 19, sec. 14, it was made "lawful to and for any landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was so held or enjoyed." Mr. Dane says that though it is not understood that this statute was adopted in Massachusetts, yet that "we have practiced on the principles of it from the first settlement of the country:" 2 Dane's Abr. 442. See also *Green v. Harrington*, Hob., Am. ed., 284 a, note. And it is the established construction of this statute in the English courts, that if a tenant takes possession under the demise, actual occupation by him till the tenancy is regularly determined is not necessary in order to render him liable to the action for use and occupation. In that action the landlord does not recover rent, but an equivalent for rent, namely, "a reasonable satisfaction for the lands, etc., held or enjoyed." If the defendant actually holds, though he does not actually occupy or enjoy, the action may be maintained against him: *Pinero v. Judson*, 6 Bing. 211; S. C., 3 Moo. & P. 504; *Izon v. Gorton*, 7 Scott, 547; S. C., 5 Bing. N. R. 507; *Atkins v. Humphrey*, 2 C. B. 657. Therefore, the landlord may recover for use and occupation after the tenant quits, if he quits without giving the notice required by law to terminate the tenancy. In such case he holds the demised premises, within the meaning of the statute: *Redpath v. Roberts*, 3 Esp.

225; *Harland v. Bromley*, 1 Stark. 455; *Gibson v. Courthope*, 1 Dow. & Ry. 206; 2 Selw. N. P., 11th ed., 1399, 1402; Comyn on Land. & Ten. 389, 390; 1 Ch. Pl., 6th Am. ed., 377, 378.

In *Whitney v. Gordon*, 1 Cush. 266, it was distinctly announced by Shaw, C. J., that a tenant who, like the present defendant, quitted at the end of a quarter without giving legal notice was *prima facie* liable in an action for use and occupation for the amount of another quarter's rent. And there is nothing in the case now before us to rebut the *prima facie* liability of the defendant to this action. The plaintiff's going into the house and shutting a door that had been left open when the defendant quitted was not a taking of possession which deprived him of a right to maintain this action; nor had it any legal tendency to show a waiver by him of the required notice of the defendant's intention to quit: *Griffith v. Hodges*, 1 Car. & P. 419; *Redpath v. Roberts* and *Harland v. Bromley*, *supra*.

The cases cited by the defendant's counsel from the New York reports, to show that in an action for use and occupation a recovery can not be had beyond the period of actual occupation, were decided upon the terms of the revised statutes of that state, which are more restricted than those of the English statute of 11 Geo. II., c. 19.

Exceptions overruled.

THE PRINCIPAL CASE IS CITED AND FOLLOWED in *Batchelder v. Batchelder*, 2 Allen, 106, to the effect that a tenant at will is liable for rent until he gives the statutory notice to quit.

COMMONWEALTH v. CASEY.

[11 CUSHING, 417.]

ORDINARY RULES OF EVIDENCE MUST NECESSARILY BE DEPARTED FROM when a person has been so injured that he can not give his testimony in the ordinary way.

DYING DECLARATIONS MAY BE MADE BY SIGNS AS WELL AS BY WORDS; and if a person in a dying condition, and so injured as to be unable to speak, is asked to squeeze the hand of the questioner if it was C. who inflicted the injury, and thereupon does squeeze such hand, this is proper evidence for the consideration of the jury on the trial of C. for murder.

INDICTMENT against Thomas Casey for the murder of Angelina Taylor, alleged to have been committed by the blow of an ax. Evidence was offered of her dying declarations, to the effect

that while she was conscious and aware of her dying situation, and unable to articulate owing to her injury, she was asked to squeeze the hand of her interrogator if it was Casey who injured her; that she thereupon took her hand from under the bed-clothing, seized the hand of her questioner, and squeezed it for about half a minute. At two other times she was questioned in the same way and responded in like manner. This evidence was admitted against the objections of the defendant.

R. Choate and C. R. Train, for the state.

B. F. Butler and G. A. Somerby, for the defendant.

By Court, SHAW, C. J. We appreciate the importance of the question offered for our decision. Where a person has been injured in such a way that his testimony can not be had in the customary way, the usual and ordinary rules of evidence must from the necessity of the case be departed from. The point first to be established is, that the person whose dying declarations are sought to be admitted was conscious that he was near his end at the time of making them; for this is supposed to create a solemnity equivalent to an oath. If this fact be satisfactorily established, and if the declarations are made freely and voluntarily, and without coercion, they may be admitted as competent evidence to go to the jury. But after they are admitted, the facts of the declarations and their credibility are still for the judgment of the jury.

In regard to the matter before the court, and the admissibility of the signs by Mrs. Taylor, in reply to the questions put to her, it is to be observed that all words are signs; some are made by the mouth and others by the hands. There was a civil case tried in Berkshire county, where a suit was brought against a railroad company, and the question was whether a female who was run over survived the accident for any length of time. She was unable to speak, but was asked if she had consciousness to press their hands, and the testimony was admitted. If the injured party had but the action of a single finger, and with that finger pointed to the words "yes" and "no," in answer to questions, in such a manner as to render it probable that she understood, and was at the same time conscious that she could not recover, then it is admissible evidence. It is therefore the opinion of the court that the circumstances under which the responses were given by Mrs. Taylor to the questions which were put her warrant that the evidence shall be admitted, but it is for the

jury to judge of its credibility and of the effect which shall be given to it.

DYING DECLARATIONS: See *McDaniel v. State*, 47 Am. Dec. 93; *Anthony v. State*, 33 Id. 143; *Dunn v. State*, 35 Id. 54.

FOSTER v. PIERCE.

[11 CUSHING, 437.]

WITNESS CAN NOT REFUSE, ON CROSS-EXAMINATION, TO ANSWER QUESTION, on the ground that it will criminate him, if, with knowledge of his privilege, he testified in his examination in chief concerning the same matter; he can not voluntarily state a part of a transaction and refuse to answer as to the residue.

PROSECUTION under the bastardy act. A witness called by defendant stated that he (witness) knew of complainant's having sexual intercourse with a person other than defendant in the month in which complainant's child was alleged to have been begotten. Complainant's counsel then asked witness to state with whom such intercourse had been. Against the defendant's objection, the witness was compelled to answer. The answer was to the effect that such intercourse was with witness. The complainant denied having had sexual intercourse with any person other than the defendant. He was convicted.

C. B. Farnsworth, for the complainant.

N. Morton, for the defendant.

By Court, DEWEY, J. The general principle of law that a witness is not bound to criminate himself is not controverted. But the question is, At what stage of the case is he to claim his privilege? Can the witness proceed to state material facts bearing upon the case, and favorable to one party, and when cross-examined by the opposite party in reference to the same subject decline answering by reason of his privilege not to criminate himself?

In the case of *Dixon v. Vale*, 1 Car. & P. 278, it was ruled by Best, C. J., that if a witness, being cautioned that he is not obliged to answer a question which may criminate him, still does answer such question, he can not afterwards take the objection to any further question relative to the whole transaction. In *Easi v. Chapman*, 2 Id. 570, Abbott, C. J., says, upon a similar objection taken to answering further questions: "You might have objected to giving any evidence, but having given a long history of

what passed, you must go on, otherwise the jury will only know half of the matter." It is said in 1 Greenl. Ev., sec. 451, where the witness after being advertised of his privilege chooses to answer, he is bound to answer everything relating to the transaction.

The latter proposition would fully embrace the present case, as the presiding judge in the bill of exceptions states that from the beginning of his evidence the witness had fully understood his privilege, as was apparent to the court. This being so, it was unnecessary for the court further to state the same to him. With this knowledge of his rights, having chosen to answer in part, he must answer fully. In the case of *Brown v. Brown*, 5 Mass. 320, a libel for divorce, the counsel proposed that a witness should be allowed to testify that he knew the party to have committed the crime of adultery, but without naming the person with whom the adultery was committed, but the court said they should inquire of the witness with whom it was committed.

It would seem quite reasonable to go somewhat further than the present case requires, and adopt the broad principle that the witness must claim his privilege in the outset, when the testimony he is about to give will, if he answers fully all that appertains to it, expose him to a criminal charge, and if he does not, he waives it altogether. In *Chamberlain v. Willson*, 12 Vt. 491 [36 Am. Dec. 356], the principle is directly held that if a witness submit himself to testify about the very matter tending to criminate himself without claiming his privilege, he must submit to a full cross-examination. If he states a particular fact in favor of the policy calling him, he will be bound on his cross-examination to state all the circumstances relating to that fact, although in so doing he may expose himself to a criminal charge. *State v. K——*, 4 N. H. 562.

We are satisfied that the ruling of the presiding judge was correct, and the exceptions are overruled.

CASES WHICH TREAT OF PRIVILEGE OF WITNESSES to refuse to answer questions tending to criminate them are very numerous, and many of them have been re-reported in this series: *Commonwealth v. Shaw*, 50 Am. Dec. 813; *Lohman v. People*, 49 Id. 340, and note 346, where the other cases in this series on the subject are cited. This topic is fully discussed in note to *Fries v. Brugler*, 21 Id. 55-62. Upon the particular point involved in the principal case there is a conflict between the English and the American authorities. The former maintain that a witness may claim his privilege at any stage of his examination, notwithstanding he has detailed part of the transaction or answered some question tending to criminate him. The latter require the witness to claim his privilege whenever questioned upon a subject

concerning which he can not answer fully without criminating himself. If he does not make this claim he is regarded as having irrevocably waived his privilege, and he must make a full disclosure: *Fries v. Brugler*, 21 Id. 61; *State v. Foster*, 55 Id. 191; *Commonwealth v. Nichols*, 114 Mass. 286; *Commonwealth v. Price*, 10 Gray, 476. In Massachusetts the practice of the court with respect to warning the witness is quite liberal, and the rule with respect to waiving his privilege is not enforced unless it is manifest that the witness in the criminatory answers which he has made has not acted ignorantly nor inadvertently. Thus in the case of *Maljo v. Mayo*, 119 Mass. 290, which was an action for divorce on the ground of adultery, the defendant sought to prove that complainant and a detective and one Mrs. French had conspired to entice him into an equivocal position with Mrs. French in order to furnish evidence of the offense charged. He called Mrs. French as a witness, and her answers tended to show either that she was guilty of conspiracy against or of adultery with defendant. She refused to answer further, claiming that she had not at first fully understood her rights. The court then struck out her answers and declined to compel her to submit to further examination. In sustaining this action of the trial court the supreme court said: "It is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness. If, after being advised generally, it appears to the presiding justice that the witness intends to insist upon his privilege, but does not fully understand his rights, it is competent for him to instruct the witness fully as to them, otherwise the witness might be entrapped into a position where his privilege as a witness would be entirely defeated through his ignorance, and he would be obliged to criminate himself. In the case at bar, therefore, it was competent for the presiding justice, after the witness had made some answers tending to criminate her, if he was satisfied that she had answered ignorantly in misapprehension of her rights and duty to the court, to instruct her more fully, and to advise her that she was not obliged to answer further. And it necessarily followed that such answers already given should be stricken out. The libellant could have no right to cross-examine the witness in regard to them, and the only way to preserve the rights of all parties was to strike them from the case, as inadvertently and improperly admitted."

COMMONWEALTH v. STEPHENSON.

[11 CUSHING, 461.]

ACCUSED MAY BE GUILTY OF FORGERY although the check drawn by him had so little resemblance to the genuine check of the person whose name was forged that it was not likely to deceive the officers of the bank on which it was drawn.

INDICTMENT for forgery of a check on the Marine Bank, purporting to be signed by F. R. Whitwell, and which was passed by defendant to Henry Britton as genuine. Defendant asked the court to instruct the jury that there was no forgery unless the check so much resembled the genuine check of Whitwell that it would be likely to deceive the officers of the bank, if men

of ordinary observation. This instruction was refused, and another given to the effect that it was forgery if the check would be likely to deceive a person of ordinary understanding, who was not familiar with the handwriting of the person whose name was forged. The defendant was convicted.

R. Choate, attorney general, for the commonwealth.

N. Morton and B. Sanford, for the defendant.

By Court, DEWEY, J. The instructions asked on the part of the defendant were properly refused. It is not necessary that there should be so perfect a resemblance to the genuine handwriting of the party whose name is forged as would impose on persons having particular knowledge of the handwriting of such party, nor is it necessary that the officers of the bank upon which a check purported to be drawn would have probably been misled and deceived by it. The intent to defraud the bank may exist, and may be found by the jury, though the officers of the bank, from their better acquaintance with the genuine handwriting of the drawer, would readily have detected the check as a counterfeit one. The authorities to this point may be found in 2 Hale P. C. 950; *Rex v. Mazagora*, Russ. & Ry. 291; *Rex v. Sheppard*, Id. 169; 3 Greenl. Ev., sec. 103.

Exceptions overruled.

CRIME OF FORGERY IS FULLY DEFINED AND CONSIDERED in a note to *Arnold v. Coet*, 22 Am. Dec. 306-321.

OSBORN v. COOK.

[11 CUSHING, 532.]

TESTATOR NEED NOT DECLARE TO WITNESSES, NOR NEED THEY KNOW, that the instrument which they attest at his request is his will. It is sufficient that he knows what the instrument is. No formal publication or declaration that it is his will is required.

APPEAL from an order denying probate of the alleged will of Nathan Cook. The will had been wholly written by the testator. There was no clause of attestation for the witnesses to sign, but their signatures were preceded by the word "witness." The testator signed in the presence of two of the witnesses, and pointed out his signature to the third witness. Each witness signed at the request of the testator and in his presence, but

neither of the witnesses knew or suspected the character of the instrument he was witnessing.

S. H. Phillips, for the appellants.

N. J. Lord, for the appellees.

By Court, THOMAS, J. The only question raised upon the appeal and the agreed statement of facts is, whether the instrument was duly executed.

This question must be determined by a just construction of the provision of the revised statutes, c. 62, sec. 6, which is: "No will, excepting nuncupative wills, shall be effectual, unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by three or more competent witnesses."

This will was in writing, signed by the testator, and attested and subscribed in his presence by three competent witnesses. It was written by the testator. He knew, therefore, if of sound mind, what he signed, and what he asked the witnesses to attest. The calling upon witnesses to attest his execution of an instrument whose character and contents he well knew was in effect a declaration that the instrument he had signed and his signature to which he desired them to attest was his act, though the character and contents of the instrument were not disclosed to them. It was as if the testator had said: "This instrument is my act; it expresses my wishes and purposes; and though I do not tell you what it is, I desire you to attest that it is my act, and that I have executed and recognized it as such in your presence." We think all the requirements of the statute are met and satisfied. No formal publication of the instrument, no declaration of its contents or of its nature, is in terms required. The legislature have prescribed certain solemnities to be observed in the execution of a will, that it may be seen that it is the free, conscious, intelligent act of the maker; but they have not prescribed that he should publish to the world or to the witnesses what is in the will, or even that it is a will.

A usage has doubtless existed to some extent in the probate courts, to inquire of the subscribing witnesses whether the testator declared the instrument he had signed to be his will; and such a declaration frequently makes part of the clause of attestation; but such declaration is not necessary. There may exist very excellent reasons why the testator may not wish to disclose, and why the law should not require him to disclose, the fact

that he has made a will at all; either, as Swinburn says, "because the testator is afraid to offend such persons as do gape for greater bequests than either they have deserved or the testator is willing to bestow upon them (lest they, peradventure, understanding thereof, would not suffer him to live in quiet); or else he should overmuch encourage others to whom he meant to be more beneficial than they expected (and so give them occasion to be more negligent husbands or stewards about their own affairs than otherwise they would have been if they had not expected such a benefit at the testator's hands); or for some other considerations:" Swinburn on Wills, 27.

It is not easy to trace the origin of the belief, which we are aware is quite prevalent, of the necessity of some formal publication of a will, or declaration by the testator that the instrument is his last will and testament; but as a question of principle or of authority, it is now settled that such publication or declaration is unnecessary.

In the case of *Wyndham v. Chetwynd*, 1 Burr. 421, Lord Mansfield says: "Suppose the witnesses honest, how little need they know; they do not know the contents; they need not be together; they need not see the testator sign (if he acknowledges his hand, it is sufficient); they need not know it is a will (if he delivers it as a deed, it is sufficient)." In *Bond v. Seawell*, 3 Id. 1775, Lord Mansfield says: "It is not necessary that the testator should declare the instrument he executed to be his will." And *Trimmer v. Jackson*, in the king's bench, cited in 4 Burn's Ecc. Law, 9th ed., 102 [6th ed. 129], was a case where the witnesses were deceived by the execution, being led to believe, from the words used by the testator, that it was a deed, and not a will; and it was adjudged a sufficient execution: See also *Wallis v. Wallis*, Id. 100 [6th ed. 127]. In *Moodie v. Reid*, 7 Taunt. 361, Chief Justice Gibbs says: "A will, as such, requires no publication; be publication what it may, a will may be good without it."

In the more recent case of *White v. Trustees of the British Museum*, 6 Bing. 310, it was held that a will was sufficiently attested when subscribed by three witnesses, in the presence and at the request of the testator, although none of the witnesses saw the testator's signature, and only one of them knew what the instrument was. Chief Justice Tindal treats the law as fully settled, that a bare acknowledgment by the testator of his handwriting is sufficient to make the attestation and subscription of the witnesses good within the statute, although such acknowledgment conveys no intimation whatever, or means of

knowledge, either of the nature of the instrument or the object of signing: See also *Wright v. Wright*, 7 Id. 457; *Johnson v. Johnson*, 1 Crompt. & M. 140.

In *Holt v. Genge*, 3 Curt. 181, Sir Herbert Jenner Fust, referring to the case of *White v. Trustees of British Museum*, *supra*, says: "This is a determination, that where a testator had written a will himself and signed it, and produces that will so signed (for that is a point never to be lost sight of) to witnesses, and desires them to sign their names, that amounts to an acknowledgment that the paper signed by them is his will, and the instrument is complete for its purpose; it is acknowledged by the testator to be his will." It would be more exact to say the instrument is acknowledged to be his act, which, upon production, is found to be his will.

In our own commonwealth the decisions lead to the same conclusion. In the case of *Swett v. Boardman*, 1 Mass. 258 [2 Am. Dec. 16], relied upon by the appellees, the marginal note of the reporter is calculated to mislead. The case was decided, and rightly, upon the ground that the testator did not know he was executing his will. Sewall, J., says: "I do not find any cases which have been decided expressly determining what amounts to a publication. But there must be proof that the person knew the instrument to be his will; that he intended it as such. In the case now under consideration there is no evidence, except the signature of the deceased, of these facts. I do not think that any particular ceremony of publication is necessary or material; but the deceased ought at least to have known and understood that he was executing his will." Sedgwick, J., places the decision upon the same ground; but says: "It ought at least to appear that the person knew he was executing his will, and that he communicated that fact to those who were called to attest the same as witnesses; and this is necessary to prevent imposition, from the situation in which persons frequently are at the time of executing these instruments." This point does not seem necessary to a determination of the case, or to be in harmony with the authorities; and the reason of it would not apply to the case of a will written by the testator himself. Dana, C. J., puts the decision upon the same ground—that there was not a particle of evidence that the testator knew he was making a will.

The more recent cases, *Dewey v. Dewey*, 1 Met. 349 [35 Am. Dec. 867], and *Hogan v. Grosvenor*, 10 Id. 54 [43 Am. Dec. 414], recognize and adopt the principles stated in the case of *White v.*

Trustees of British Museum, supra. In *Hogan v. Grosvenor, supra*, Hubbard, J., said: "We consider the law as settled, that the testator need not execute the instrument in the presence of the witnesses; that they need not sign in the presence of each other; and that all which is required is, that the testator shall see their attestation, or be in a situation where he can see it. His acknowledgment that the instrument is his, with a request that they attest it, is sufficient."

The doctrine of these cases covers the ground of this. If any declaration is necessary, it requires no set form of speech, indeed, no words; it may be done by acts as well as words. *Non quod dictum, sed quod factum est, inspicitur.* And the presentation of the instrument, written by the testator himself and bearing his signature, to the witnesses, with a request for them to attest it, was sufficient.

Decree of court of probate reversed.

WITNESSES TO WILL NEED NOT KNOW FROM TESTATOR, nor otherwise, that the instrument which they are called to attest is a will: *Ela v. Edwards*, 16 Gray, 92; *Tilden v. Tilden*, 13 Gray, 114; nor need there be any formal clause of attestation: *Ela v. Edwards*, 16 Gray, 96. With respect to the execution and attestation of wills, see *Wright v. Lewis*, 55 Am. Dec. 714; *Greenough v. Greenough*, 51 Id. 567, and note; *Rosser v. Franklin*, 52 Id. 97, and note; *Jauncey v. Thorne*, 45 Id. 424, and note; *Nelson v. McGiffert*, 49 Id. 170; *Rigg v. Wilton*, 54 Id. 419; *Reynolds v. Reynolds*, 40 Id. 599; *Hogan v. Grosvenor*, 43 Id. 414, and note; *Dewey v. Dewey*, 35 Id. 367; *Guthrie v. Owen*, 35 Id. 311, and note.

LUND ET UX. v. INHABITANTS OF TYNGSBOROUGH.

[11 CUSHING, 563.]

ONE WHO VOLUNTARILY LEAPS FROM WAGON TO ESCAPE from an apparently greater peril occasioned by a defect in a highway may recover damages for injuries suffered by him, under a statute making a town liable for injuries caused "by reason of any defect or want of repair in any highway," although neither he nor the wagon come in contact with the defect, provided the circumstances were such as to justify his conduct in leaping from the wagon.

UNDER COMPLAINT FOR DAMAGES SUSTAINED BY BEING THROWN FROM WAGON by reason of its being brought into contact with a defect in a highway, the plaintiff is not entitled to prove damages arising from his voluntarily leaping from such wagon to avoid injuries rendered imminent by such defect.

REVERSAL MAY BE HAD FOR INSTRUCTIONS CORRECT IN ABSTRACT, but not adapted to the case stated in the pleadings, such instructions being given to the jury in response to an inquiry made by them, and after the case had been tried on the theory stated in the complaint.

ACTION to recover for injuries to Mrs. Lund, alleged to have been occasioned by a defect in the highway. The plaintiffs were traveling along the highway between eight and nine o'clock in the evening. Across the road ran a culvert, in one end of which was a hole. The plaintiffs' horse became frightened at the playing of a band of music. Mrs. Lund was found on the ground near the culvert seriously hurt. The evidence was conflicting as to whether she jumped from the wagon or was thrown from it, and as to whether the wagon came into actual contact with the hole or culvert. The wagon was not shown to have been upset. After the jury had received their instructions and retired for consultation they returned and inquired whether the defendants were liable if the wheel of the wagon did not go into the hole, but Mrs. Lund jumped for fear she would be injured if it did go into the hole. The court replied, in substance, that the defendants would be liable in such contingency, if the jumping were not done rashly, but, under the circumstances, was a prudent precaution to escape from imminent danger. Verdict for plaintiffs. Defendants excepted.

G. F. Farley, for the plaintiffs.

J. G. Abbott, for the defendants.

By Court, DEWEY, J. It is contended on the part of the defendants that the rules of law applicable to carriers of passengers in stage-coaches or other vehicles, where, by reason of exposure to great bodily harm through some default of the carrier, the passenger voluntarily throws himself from the carriage to avoid a greater peril, and thereby receives a bodily injury, do not apply to towns, in reference to travelers upon a defective highway, and who, by reason of a like exposure by their imminence of contact with such defect, have thrown themselves from their carriage or other vehicle, and thus received a serious personal injury. The plaintiffs not having come in actual contact with the defect in the highway, it is said that the liability has not attached to the town. But this, we think, is too limited a construction of the statute. The injury to be compensated for by the town is one that has been occasioned "by reason of any defect or want of repair in any highway," etc. Such injury to the person may be occasioned by reason of the defect of the highway, when the traveler, being brought suddenly into imminent peril by his near approach to it, in the exercise of ordinary care and prudence, voluntarily leaps from his carriage and suffers an injury thereby. The circumstances must be such as to justify his conduct, and

the defect in the highway must have been the cause of his voluntary act of throwing himself from the carriage.

It is further insisted, however, that the instructions given to the jury on their coming into court and asking further instructions after the case had been committed to them, although correct as abstract propositions, or in reference to other cases that might have called for such a ruling, yet were unauthorized in this particular case, and upon the cause of action as set forth in the declaration. The declaration, after setting forth the defect in the highway, alleges, as the ground for recovering damages, "that by reason of said defect in said highway the said Mary was violently thrown from said wagon upon the ground," whereby, etc., she was injured in her limb.

The plaintiffs' case, as set forth in the declaration, obviously points to the case of being involuntarily thrown from the wagon by reason of the same coming in contact with the alleged defect and obstruction in the highway. It was this case which was on trial before the jury, and evidence of an accident occasioned by a voluntary leaping from the wagon to avoid a peril to which the female plaintiff was exposed by remaining in the same, that of the wagon being upset by actual contact with the hole in the highway, would have been liable to the objection of a variance between the declaration and the proof.

The instructions given, therefore, although entirely proper under a declaration adapted to the state of facts supposed, were not applicable to the case as presented on the pleadings. They were such as authorized the jury to find that the plaintiffs had maintained the action by proof of a voluntary leaping from the wagon under justifiable circumstances, to avoid danger from the defect in the highway, although the wagon did not go into the hole, and the party was not thrown out.

The further inquiry then arises, whether the defendants can, at this stage of the case, avail themselves of this variance between the declaration and the evidence relied upon to sustain the verdict.

Dealing with this case as the ordinary one of a case tried before a jury upon questions of fact contested by the parties, and where the case opened by the plaintiff, and the case as argued and submitted to the jury, directly presented the question upon which their verdict was found, we should hold the defendants estopped from taking the objection, after verdict, to a variance between the declaration and the proof. Not having taken this objection at the proper stage of the case, they should not be

allowed to raise it afterwards for the first time on a bill of exceptions, or report of the case by the presiding justice. If taken at the trial, the plaintiff might ask leave to amend, and thus at an early period obviate the objection before the case was submitted to the jury, while the other party would also be fully protected in all his legal rights, compelling the party to amend or discontinue his action.

This case does not thus present itself, as we understand from the report and the argument at the bar. The instructions complained of, that the defendants were liable in this action although the wheel of the wagon did not go into the hole, and Mrs. Lund was not thrown out of the wagon but voluntarily jumped out of it, under such circumstances of exposure to danger as would justify her in so doing, in the exercise of ordinary care and prudence, were not given in the ordinary charge of the judge in summing up the case to the jury, but after the jury had been out some time, and had come into court and asked certain further instructions or directions in matters of law upon a question propounded by them to the court. Communications from the court at this stage of the trial are usually deemed a matter in which the counsel are not to interfere, and their silence, if present, which might or might not be the case, should not estop them from raising any question upon the correctness in matters of law of any new instructions thus given as to the right of the plaintiff to maintain his action. The instructions being given under these circumstances, the court are of opinion that it is open to the defendants to question their correctness as applied to the case stated in the plaintiffs' declaration. As already stated, the case upon which the instructions were given, in answer to the inquiry of the jury, was not the case stated in the plaintiffs' declaration.

The verdict must be set aside, and a new trial had.

THE PRINCIPAL CASE HAS BEEN CITED AND DISTINGUISHED in several subsequent cases in Massachusetts. In some instances, in that state, horses becoming frightened by obstructions in the highway, became unmanageable and ran away, causing damage by their flight, but not coming in contact with the obstruction. It was held that these cases were not analogous to the principal case; that the damage was neither directly produced by the obstruction or defect nor by a reasonable attempt to avoid it, but by the running away of a frightened horse; and therefore, that the town was not liable under the statute: *Cook v. Charlestown*, 98 Mass. 82; *Kingsbury v. Dedham*, 13 Allen, 189. The rule of the principal case was reasserted in *Sears v. Dennis*, 105 Mass. 312, in the following language: "The liability of towns for defects in a highway is not limited to injuries suffered by reason of a traveler, or his

horse or carriage, coming into immediate contact with the defect, but extends to injuries to the horse while under the immediate impulse or impetus received from the defect, or during reasonable efforts to relieve him from the position into which he has been thrown by coming into contact with the defect, or to the traveler by voluntarily leaping from the carriage, in the exercise of ordinary care and prudence, to avoid apparently imminent danger from being brought into contact with the defect, or from impending consequences immediately resulting therefrom."

UPTON v. SUFFOLK COUNTY MILLS.

[11 CUSHING, 586.]

GENERAL SELLING AGENT HAS NO AUTHORITY to depart from the usual manner of accomplishing what he is employed to effect.

GENERAL SELLING AGENT HAS NO AUTHORITY TO WARRANT THAT FLOUR sold by him will keep sweet during voyage from Massachusetts to California.

ASSUMPSIT for breach of warranty. The defendants' general selling agent, W. W. Allcott, sold four thousand barrels of flour at Boston, to plaintiff, a merchant in the California trade, and warranted it "to keep sweet during voyage to California." Allcott was shown to be superintendent and general agent of the defendants. His duties were confined to manufacturing and selling on commission. The other facts appear from the opinion. The plaintiff was to be nonsuited if the court should find that the contract of warranty was not authorized nor ratified by defendants.

G. T. and C. P. Curtis, jun., for the plaintiff.

C. G. Loring and J. W. Thornton, for the defendants.

By Court, METCALF, J. The court have not found it necessary to form an opinion upon a question which was ably argued, namely, whether the contract declared on legally purports to be a contract between the plaintiff and the defendants. Assuming that it does, yet we are all of opinion that the defendants are not bound by it, because Allcott had no authority to bind them by such a contract. It appears from his testimony that he was their general selling agent, and had no special instructions in regard to making sales; that no authority (by which he doubtless means express authority) was ever given to him by the defendants to make such a warranty as that on which this action is brought; that no extra price was paid for the flour by reason of the warranty; that though the sale was entered on the defendants' books, yet that the warranty was not entered there; and

that the defendants had no notice of the warranty until they were called upon by the plaintiff to answer for a breach of it.

The single question which we have examined is, What is the extent of the implied authority of a general selling agent? The answer is, It is the same as that of other general agents. And it is an elementary principle that an agent employed generally to do any act is authorized to do it only in the usual way of business: *Smith's Merc. Law*, Am. ed. 1847, p. 105, 5th ed., 129; *Woolrych on Com. & Merc. Law*, 319; *Jones v. Warner*, 11 Conn. 48. A general agent is not by virtue of his commission permitted to depart from the usual manner of effecting what he is employed to effect: 3 Chit. Law of Com. & Man. 199. When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold: *Story on Agency*, sec. 60. See also *Shaw v. Stone*, 1 Cush. 228. The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on credit, and to warrant the soundness of the article sold, when such is the usage: *Goodenow v. Tyler*, 7 Mass. 36; *Alexander v. Gibson*, 2 Camp. 555; *Nelson v. Cowing*, 6 Hill, 336; 2 Kent's Com., 6th ed., 622; *Russell on Factors*, 58; *Smith on Master and Servant*, 128, 129. But as stocks and goods sent to auction are not usually sold on credit, a stock-broker or auctioneer has no authority so to sell them unless he has the owner's express direction or consent: *Wiltshire v. Sims*, 1 Camp. 258; 3 Chit. Law of Com. & Man. 205; 1 Bell's Com. 388. And it was said by Mr. Justice Thompson, in *The Monte Allegre*, 9 Wheat. 647, that auctioneers have only authority to sell, and not to warrant, unless specially instructed so to do.

As there is no evidence or suggestion of a usage to sell flour with the hazardous warranty that it shall keep sweet during a sea-voyage in which it must twice cross the equator, we deem it quite clear that nothing short of an express authority conferred on Allcott by the defendants would empower him to bind them by such a warranty: See *Cox v. Midland Counties Railway Company*, 3 Exch. 278.

Plaintiff nonsuit.

DE WOLF v. GARDNER.

[12 CUSHING, 19.]

TROVER CAN NOT BE MAINTAINED AGAINST CONSIGNEE'S PLEDGERS BY CONSIGNOR OF SPECIFIC BARRELS OF FLOUR where the consignor drew his draft on the consignee "against the flour," which the former discounted and the latter accepted, but did not pay at maturity; and where attached to the draft was a warehouse receipt and a certificate executed by the consignor, by which he agreed to hold the flour subject to the sole order of the consignee or his assigns, and to ship the same to him by the first opportunity, and certified that the draft had been drawn as above, and that the receipt and certificate should remain attached thereto, and be evidence of a lien on the flour in favor of the holders of the draft until payment, but reserved to the consignee the right to sell the flour, holding the proceeds instead thereof in trust for the holders of the draft. The consignor has so far parted with the right of property and of possession, which are so far vested in the holders of the draft that the consignor can not maintain the action.

TROVER for a number of barrels of flour. It appeared upon the trial that the plaintiff, who resided at Detroit, purchased flour, sometimes on his own account and sometimes on joint account with one Gibson, of Boston. In October, 1847, the plaintiff, having made a purchase while the flour was in his store at Detroit, executed a certificate and a duplicate warehouse receipt of five hundred barrels specifically marked and branded, drew his draft on Gibson against the flour, attached the receipt and certificate to the draft, and discounted the draft at the Michigan State Bank. The draft, accompanied by the receipt and certificate, was sent to Gibson, who accepted it but never paid it. While the flour was *in transitu*, consigned to Gibson, the latter pledged it to the defendants, Gardner & Co., for certain advances, and the defendants received the same and paid the charges thereon. The substance of the receipt and certificate appears in the opinion. It was contended by the defendants that the plaintiff's title and possession were transferred by the draft, receipt, and certificate, but the presiding judge ruled otherwise. Verdict for the plaintiff, and exceptions by the defendant to the ruling.

C. P. Curtis and E. Merwin, for the plaintiff.

S. Bartlett and G. G. Hubbard, for the defendants.

By Court, SHAW, C. J. This case presents an exceedingly important and interesting question, affecting the very large and growing trade between the western states and the markets and

shipping ports of the Atlantic coast in the great staples of grain, pork, and other country produce. The facts in the present case are as follows:

The plaintiff executed in his own name a duplicate warehouse receipt, dated the twenty-seventh of October, 1847, acknowledging that he had received in store, in good order, etc., five hundred barrels superfine flour, branded and marked, and which he agreed to hold, subject to the sole order of Charles D. Gibson or his assigns, and by the first opportunity to ship the same consigned to him, with conditions that said receipt remained attached to the following certificate, referring to the property described in such receipt: "I hereby certify that I have drawn my draft for two thousand two hundred and fifty dollars, dated October 27, 1847, payable December 26-29, and numbered twelve, on said Charles D. Gibson, against the property described in receipt herewith, numbered twelve, by F. H. De Wolf. This receipt and certificate shall remain attached to said draft, and shall be evidence of a lien on the said property in favor of the holders of said draft until payment; but reserving to the consignee named in this receipt and certificate the right to sell the same upon receipt, holding the proceeds, instead of said property, in trust for the holders of said draft. Fitz Henry De Wolf." On the margin of this certificate was written, "Consignee, Charles Dana Gibson, Boston." A draft drawn by De Wolf on said Gibson was also annexed, being described as No. 12, corresponding with the number of the receipt and certificate above, for two thousand two hundred and fifty dollars, and drawn "against the flour in the warehouse receipt." This draft was discounted by the Michigan State Bank, and with the warehouse receipt and certificate accompanying was forwarded by the bank to Boston, presented to Gibson, and by him accepted. The draft was presented at maturity for payment, but has never been paid.

These documents all bear one and the same date, are parts of one transaction, refer to each other, and must be construed together. The intent is clear and manifest that these specific barrels, branded, marked, and numbered, and so capable of being identified and distinguished, should stand as collateral security for that draft. Notice is given to Gibson, the consignee. He could only know of the deposit, pledge, and intended consignment to himself by a presentation of the documents; and his acceptance of the draft was an assent to take the consignment upon the terms proposed.

It is an old rule of mercantile law that when goods are consigned to a person with notice that a draft is drawn against it by the consignor in favor of a third person, the consignee can not accept the consignment and refuse to accept the draft. But here he did, in terms, accept the draft as drawn against that consignment. It is not necessary to determine at what precise time the change of property was effected by discounting the draft upon the credit of this peculiar form of pledge; it is sufficient that he who had the *jus disponendi* agreed that the person discounting his draft should have the property as security, and consigned it to Gibson, stating to him the purpose for which it was placed in his possession, to sell it, and from the proceeds pay to the plaintiff, or other holder of the draft, the amount of it, and this gave a special property in the flour to such holder.

When the notice of the intended consignment was given to the consignee Gibson, and he assented to it, he assented to receive it on account of the bank as holder of his acceptance; he became their agent to receive, hold, sell, and account for the flour, and from that time they became the owners of the property. It is not necessary to hold that they were absolute owners; it is enough that they had a right of property and of possession to secure the payment of the particular draft, and the right of the plaintiff as former owner of the specific property had become divested, and his right remained only to the surplus money which might remain after a sale of the flour and a payment of the draft from the proceeds. The ground of defense in the present case is, that supposing the plaintiff is correct in holding that the defendants, taking a pledge of these goods from a factor and consignee, for sale, derived no title to the goods, but on the contrary, by such an attempt to pledge this flour, the consignee forfeited his own lien on it, still that the conversion was not a conversion of the property of De Wolf, and that he can not maintain this action. The court are of opinion that this defense is well maintained, and that the illegality of the transaction, by which the defendants acquired the possession of the property and converted it to their own use, is of no importance to the plaintiff; because whatever of wrong there may be in this transaction on the part of the defendants, the plaintiff is not the proper party to obtain redress by a suit. This depends upon the question whether enough was done in the present case to divest the ownership of the plaintiff, and vest the special property in the barrels of flour in the holder of this draft.

It is very obvious from the facts proved that the plaintiff in-

tended so to part with these specific barrels of flour as security for this specific draft; and this could be done only by parting with the control and disposing power of it in himself, and vesting it in such holder or in some agent for his use. The same person may be agent to take and hold possession both for buyer and seller. If goods are in the warehouse of a third person, the owner holding the receipt of the warehouseman, a delivery of such receipt, upon a contract of sale or hypothecation by the vendor to the vendee or pledgee, and notice of it to the warehouseman, especially if he assents, makes him agent for the vendee or pledgee, and amounts to a good constructive delivery, because it changes the possession and dominion. In this case it is obvious that in the first instance, when the receipt was given as security for this draft, it was the vendor's or pledgor's own receipt, so that he still remained in possession. Whether the fact of giving such receipt would convert the vendor into a warehouseman, and whether such holding of possession in another capacity would be a good delivery, may be a subject of question; but it was recently held, upon very high authority, that such a receipt given by the seller of goods, who had received his pay for them, with an agreement to forward them upon the opening of the canal, would amount to such a constructive delivery as to transfer the property and possession to the vendee. This was placed somewhat upon the nature of the western produce trade, and the customs and usages which have grown up respecting it: *Gibson v. Stevens*, 8 How. 384. Some important points were determined in this case. It was considered, under the circumstances, that such warehouse receipt given by the seller to the purchaser was a good delivery; that a transfer of such receipt without a formal assignment upon a contract of sale absolutely, or as security for money advanced, was a good transfer of the property, and constructive possession thereof; and that as respects the legal title there can be no distinction between the advance of money made on the credit of this documentary evidence of property and the case of an actual purchase. To the extent of such advances, the party making them was a purchaser, and the legal title was conveyed to him to protect his advances. It is not like the lien of a factor, but a legal title and right of property passes to the one who thus advances the money: See also the case of *Grove v. Brien*, Id. 429.

Recent English authorities lead to the same result. "If," says Parke, B., in *Bryans v. Nix*, 4 Mee. & W. 791, "the in-

tention of the parties to pass the property, whether absolute or special, in certain ascertained chattels is established, and they are in the hands of a depositary, no matter whether that depositary be a common carrier or shipmaster, employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected."

In the present case it is manifest, from the whole tenor of the transaction, that the property should stand conditionally bound to the holder of the draft; that it was to be placed in the hands of Gibson, as consignee, for sale, but until a sale, to hold for the holder of the draft. To this Gibson assented, and thereupon became agent for such holder. The terms of the certificate are, that it shall remain attached to said draft, as evidence of a lien on the property in favor of the holder, until payment. This gave to the consignee named, Gibson, the power of a factor, to sell the same upon its receipt, holding the proceeds instead of said property, accountable as agent to the holders of the draft, and to the consignor for the balance. It is very manifest from the whole language of these documents, and the delivery of them as evidence of property, that until a sale the consignee held the flour as the property of the holders of the draft, and his possession was their possession. So when goods are forwarded by a debtor to his creditor to meet advances, and delivered to a carrier, it is a transfer of the property, though the goods are to pass through the hands of those who have claims upon the consignor; yet they are considered so far the property of the consignee that he may maintain trover for them: *Evans v. Nichol*, 3 Man. & G. 614.

On the whole, this court are of opinion that the plaintiff had so far parted with the right of property and the right of possession of these barrels of flour, at the time of the alleged conversion of them by the defendants, by taking them as security from Gibson, the consignee, who as factor had no right to pledge them, and the right of property and of possession had so far vested in the holders of the draft, for security of which the plaintiff had pledged them, that he can not maintain this action.

Verdict set aside.

SUBSEQUENT HISTORY OF THE PRINCIPAL CASE.—After the decision given in the principal case, the Michigan State Bank filed a bill in equity against Gardner & Co., De Wolf, and Gibson, averring that the plaintiff's claim cov-

ered the entire property, and praying for an account of the sales of the flour by Gardner & Co., and for the payment out of the proceeds of the amount of the plaintiff's lien, with interest. The bill was taken for confessed against all the defendants except Gardner, who demurred, on the ground that De Wolf should have been made a party plaintiff instead of a party defendant. This demurrer was overruled in *Michigan State Bank v. Gardner*, 3 Gray, 305, the principal case being cited (p. 308) as settling that the legal title to the property was in the bank. On an answer being subsequently put in, the court, in *Michigan State Bank v. Gardner*, 15 Id. 362, held that it had jurisdiction of the bill on two grounds: 1. Because there were more than two persons having distinct rights and interests, which could not be settled by one action at law; 2. Because the liability of Gardner to the plaintiffs was that of a trustee, not of the legal estate, but the qualified property, coupled with possession and power to use. The court further held that by the acts of De Wolf a special property vested in the plaintiffs, who had a right, on giving notice to Gibson before he had otherwise disposed of the goods consigned, or their proceeds if sold in the ordinary course of business, to hold him liable in equity for the amount of the draft; and also, that at common law, and under the statute of 1845, c. 193, the consignee, Gibson, had no power to pledge the goods consigned to him for sale; and the lien previously created upon such goods by the consignor, with Gibson's knowledge, would follow them into the hands of Gardner & Co., to whom Gibson had fraudulently pledged them, the principal case being referred to (p. 374) on this latter point.

CONSIGNEE MUST ACCEDE TO TERMS OF SHIPMENT in order to acquire any rights over the consigned goods: *Bank of Rochester v. Jones*, 55 Am. Dec. 290, and note; *Winter v. Coit*, 57 Id. 522. The principal case is cited to this point in *First National Bank v. Crocker*, 111 Mass. 167; see also *Michigan State Bank v. Gardner*, 15 Gray, 362, referred to *supra*. In the first of these latter cases the principal case was said (p. 169) to have, in many respects, a close analogy to a case where the indorsees of a draft, who had discounted the same on the faith of consigned goods, and had received the bill of lading, were permitted to maintain an action for conversion against consignees who had refused to accept the draft, but took possession of and sold the goods.

CONSTRUCTIVE DELIVERY OF CONSIGNED GOODS OCCURS BY TRANSFER OF BILL OF LADING, warehouse receipt, etc.: *Bank of Rochester v. Jones*, 55 Am. Dec. 290, and notes thereto. The indorsement and delivery of a bill of lading to one who advances money upon a draft is a transfer of some interest in the goods shipped: *Hathaway v. Haynes*, 124 Mass. 313, citing the principal case as a leading one on this subject; see also the principal case referred to on this point in *Hallgarten v. Oldham*, 135 Id. 8. In *First National Bank v. Dearborn*, 115 Id. 223, the principal case was also cited in holding that replevin may be maintained by a bank discounting a draft drawn on the consignee and receiving the bill of lading of the consigned goods, against an officer attaching the goods upon a writ against the general owner, to the point that it was not necessary to hold that the plaintiff was absolute owner of the property; it was enough that he had the right of property and of possession to secure payment of the draft, and the right of the former owner had become divested, leaving him only a right in the surplus money which might remain after a sale of the goods and a payment of the draft from the proceeds.

INHABITANTS OF HANCOCK v. HAZZARD.

[12 CUSHING, 112.]

TOWN TREASURER AND COLLECTOR IS NOT EXCUSED FROM FAILURE TO PAY OVER MONEY COLLECTED by him by its loss through theft without his fault.

CONTRACT on a bond against the principal and a surety. The principal, Hazzard, had been treasurer and collector of the town of Hancock, and had given a bond conditioned that he, "as treasurer and collector aforesaid, shall faithfully collect, account for, and pay over all taxes which he should be legally required to collect, and also with diligence and fidelity discharge all the other legal duties of the aforesaid office." The breach alleged was that Hazzard had failed to pay over to the county treasurer the tax apportioned to the town of Hancock. The defendants admitted the failure to pay, but offered to prove that after the money had been collected by Hazzard, and while it was in his possession as treasurer, it was stolen from his dwelling-house, without any default on his part, and while in the exercise of due care, diligence, prudence, and fidelity. It was agreed that if the court was of the opinion that these facts, if proved, constituted a defense, the case should be set down for trial; but if not, judgment was to be rendered for the plaintiffs. The plaintiffs accordingly had judgment, and the defendants appealed.

J. D. Colt, for the plaintiffs.

H. S. Briggs, for the defendants.

By COURT. A collector of taxes, by accepting the office, takes the risk of the safe keeping of the money he has actually received. His obligation is not regulated by the law of bailments, and the cases cited to that effect are inapplicable. He is a debtor, an accountant, bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for non-performance; this is founded on the nature of his contract and considerations of public policy: *United States v. Prescott*, 3 How. 578, it being a duty of the collector to account for and pay over to the treasurer: *Inhabitants of Colerain v. Bell*, 9 Met. 499; and the excuse of loss by theft being unavailing, the sureties in the bond are liable equally with the principal.

Judgment on the agreed facts for the plaintiffs.

TOWN TREASURER'S LIABILITY FOR MONEYS COLLECTED.—The legal possession of specific moneys in the hands of a treasurer of a city or town, from whatever source, is in such treasurer: *Railroad National Bank v. City of Lowell*, 109 Mass. 216. He is not a bailee of moneys received, but an accountant, bound to pay over an amount equal to the amount coming into his hands: *Inhabitants of Egremont v. Benjamin*, 125 Id. 19; *Agawam National Bank v. Inhabitants of South Hadley*, 128 Id. 507; therefore the fact that such money was stolen from him without his fault will not release him from his obligation to make such payment: *Halbert v. State*, 22 Ind. 131; and he can not be required to account for and pay over amounts collected or received by him as interest on such money loaned to or deposited with a bank: *Shelton v. State*, 53 Id. 333. The principal case was cited to all the foregoing points. But in *State v. McCarty*, 1 Wil. Sup. Ct. 221, it is held that by the Indiana embezzlement act of 1861, the officers therein named are prohibited from using public funds in their hands as their own, or in any manner not authorized by law; such moneys, therefore, could not become the property of the officer holding them, but remained the moneys of the particular fund on account of which they were paid to the officer, holding the principal case, *Halbert v. State*, *supra*, and others, inapplicable. In *Perley v. County of Muskegon*, 32 Mich. 142, the principal case was also cited to the point that the liability of the treasurer therein was rested on the principle of *Inhabitants of Colerain v. Bell*, 9 Met. 499, that it was his own money for which he had become a debtor, and liable at all events.

CONWAY TOOL CO. v. HUDSON RIVER INS. CO.

[12 CUSHING, 144.]

POLICY IS AVOIDED BY EFFECTING SUBSEQUENT INSURANCE, of which no notice was given, and no acknowledgment thereof made, where such policy was to cease if the assured should thereafter make any other insurance on the property without notice given to the company, and the same indorsed on the policy or otherwise acknowledged in writing, and where the application covenanted that the property was at the time insured for certain amounts in certain companies, but in fact no such insurance existed, and the subsequent insurance was made in other companies, although for an amount not exceeding the amounts specified in the application as existing. The stipulation can not be so construed as avoiding the policy only in case insurance exceeding the amounts stated in the application be thereafter effected without notice thereof given.

CONTRACT upon a fire insurance policy. The defendants claimed the policy was avoided. It appeared by the bill of exceptions that the defendants' evidence showed that the plaintiffs in their application represented the property to be insured for five thousand dollars in the *Ætna* office, and three thousand dollars in the Conway Mutual office, when in fact there was no such insurance. The policy contained the following clause: "And the assured hereby covenants and engages that the representation in the application contains a just, full, and true expo-

sition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as known to the insured, and are material to the risk; and that if any material fact or circumstance shall not have been fairly represented, or if the assured or their assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." It was further proved by the defendants that insurances were subsequently effected on the property in the Trenton and Lafayette offices, of which the defendants had no notice; and this was conceded by the plaintiffs. But the plaintiffs offered to show that at the time of their application the defendants' agent inserted therein the statement as to the insurance in the *Ætna* and Conway Mutual offices, with full knowledge of the facts, which were that there was only an application at the *Ætna* office, and a temporary arrangement at the Conway Mutual office, by which it was agreed that an expired policy there for two thousand five hundred dollars should remain alive and operative; and that the plaintiffs were informed by the agent that if insurance was subsequently effected at these offices or elsewhere, in substantial compliance with the representations as to the amount, it would be sufficient. The plaintiffs contended that the insurances at the Trenton and Lafayette offices were made in consequence of the agent's assurances, and were a substantial compliance with the representation as to the amount of insurance on the property. The evidence thus offered was objected to as varying the written contract, and was rejected for the purposes of the trial. The plaintiffs further claimed that there was evidence on the face of the papers from which a jury might infer that the subsequent insurances were a fulfillment of the representation, and that the policy would not be avoided by such insurances unless they were for a total sum larger than that stated in the application; but the presiding judge ruled otherwise. A verdict was thereupon taken for the defendants. Exceptions by the plaintiffs to the rulings.

D. Aiken and R. Choate, for the plaintiffs.

D. Foster, for the defendants.

By Court, SHAW, C. J. Two grounds of defense are relied on. The first is, that it was represented in the application that the buildings then proposed to be insured were at the time under

insurance at the Conway and Ætna offices, the one for five thousand dollars and the other for three thousand dollars, when in fact no such insurance subsisted at the time, and that this misrepresentation avoided the policy.

The other ground of defense was founded on a clause in the policy, that if the assured should thereafter make any other insurance on the same property, and should not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. It was conceded that policies were subsequently effected on the property at the Trenton and Lafayette offices, of which no notice was given to the defendants.

The latter is *prima facie* a good defense. This being a plain and explicit stipulation in the contract, if such subsequent insurance was effected, and no notice of it was given to the company, and no acknowledgment thereof made by them, the policy, by its own terms, was at an end.

But the plaintiffs offer to excuse this by showing something equivalent, and forming a substantial performance of this stipulation, or a legal substitute for it. This is founded in the theory that the object and purpose of this stipulation, in connection with the representation of subsisting former assurances to the amount of eight thousand dollars, was, that the insurance was intended to be made on buildings already insured for eight thousand dollars, and although they were not so insured at the time, they were intended to be, and in fact soon after were, insured for the like amount, at offices equally good with those named, and therefore the first representation was substantially true. This is relied on as an answer to the alleged misrepresentation.

But further: in answer to the other ground, the plaintiffs insist that the only purpose of a stipulation for notice to the company, in case of further insurance, is to inform them of any insurance beyond the eight thousand dollars, of which notice was given in the application, being either then true or intended to be, and in fact soon after was made true; and therefore, if no insurance was subsequently made beyond that of eight thousand dollars, the obligation to give notice of it did not apply.

The court are of opinion that this stipulation will not bear this construction. The two stipulations relate to distinct subjects clearly defined. The first is that of the assured having already any other insurance, a past transaction, a subsisting

fact, true or otherwise. Was there any insurance other than this? The other was hypothetical, to take effect if the assured should thereafter make any other insurance. This, like the preceding clause, means insurance other than the present. But should it be construed to mean other than this and the preceding insurance, the policies made subsequently at the Trenton and Lafayette offices must be other than either of these, and therefore the stipulation was it should be notified. Besides, insurance at the Trenton and Lafayette offices, though for the same amount, must be other than insurance at the Ætna and Conway Mutual offices. The construction which we are asked to put on this unqualified stipulation, that any insurance hereafter made shall avoid the policy if not notified, must be held to mean any insurance exceeding eight thousand dollars; thereby wholly changing its character and legal effect. When the terms and stipulations in a contract are plain and clear, we are bound to follow the terms as the only authentic expression of the intentions of the parties; and in such case there is no room for exposition. It may be that the main purpose of such notice was intended to be that the company might know what other insurances would be contributory in case of loss. But this may not have been the only purpose. Others at least may be supposed; such as having the best and most satisfactory evidence before them, and on their own books or files, of the whole amount at risk on the same subject at the same time. There is a provision in the policy that the company may, on certain notice given, return a proportion of the premium and rescind the contract. Notice of all insurances may be necessary to enable them satisfactorily to exercise this right. But, as already said, whatever may have been the purpose, here was the express stipulation; and to imagine a supposed purpose, and qualify the stipulation so as to give it effect or not, as it would subserve that purpose, would be to ingraft an exception on the contract which the parties have not inserted, and make that conditional which they have made absolute. Exceptions overruled.

MISREPRESENTATION, WHEN AVOIDS POLICY: See *Daniels v. Hudson River Fire Ins. Co.*, *post*, p. 192, and notes thereto.

THE PRINCIPAL CASE WAS CITED in *Behler v. Mutual F. Ins. Co.*, 68 Ind. 354, to the point that where a by-law of an insurance company declared that should any one have insured property in this and another company, then the policy of this company shall be void, except such double insurance is with the knowledge and consent of the directors, and is indorsed on the policy, the agent of such company has no authority to consent to a second policy, and thereby bind the company, and his neglect to indorse it upon the first policy will not excuse the insured.

PIERCE v. CATE.

[12 CUSHING, 190.]

PRESENTMENT OF NOTE TO MAKER OR DEMAND AT PROPER PLACE IS NOT EXCUSED, so as to charge the indorser, by the fact that the maker has absconded, leaving no visible property subject to attachment, although the indorser knew of such absconding.

NOTICE TO INDORSER OF MAKER'S DEFAULT IS PREMATURE if given before the close of business hours on the last day of grace, although after bank hours, when no presentment to or demand upon the maker has been made, and the note is not payable by its terms or by usage at a bank, nor placed in a bank for collection; and this although the indorser knew that the maker had absconded.

ACTION against the indorser of a promissory note. The plaintiffs had a verdict, and the defendant excepted. The opinion states the facts.

C. P. Judd, for the plaintiffs.

G. Minot, for the defendant. •

By Court, **SHAW, C. J.** This is a suit by the plaintiffs, as indorsees of a promissory note made by one Moses A. Brown, payable to the defendant or his order, three months after date, and indorsed by the defendant. Before the maturity of the note the maker absconded, leaving no visible property subject to attachment, but returned after the note became due. The maker and indorser resided in the same town, near each other. There was evidence tending to show that on the last day of grace, after two o'clock (the ordinary close of bank hours), the plaintiffs sent a letter to the defendant by mail, dated on that day, to this effect: "M. A. Brown's note, three months from December 25, 1848, indorsed by you, is due this day, and unpaid, and we shall look to you for the payment of the same." The note was not at any bank on that day, and no demand on or inquiry for the maker was proved.

The court instructed the jury that if the maker had absconded, leaving no visible property subject to attachment, no presentment of the note to the maker, or demand at his dwelling-house, or other inquiry for him, was necessary; and further, that if the defendant, the indorser, knew that the maker had absconded, that the notice sent before sunset on the last day of grace was sufficient notice of dishonor to charge the indorser.

The court are of opinion that these directions are not sustained by the rules of law, and that they were incorrect on both

points. We are aware that in some of the earlier cases in Massachusetts it was held that proof that the maker had absconded, or failed and become insolvent, so that a demand would be unavailing, would be an excuse for want of presentment: *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206]. But it has been decided, on consideration and upon principle, that the obligation of an indorser is conditional; that is, that he will be answerable if at the maturity of the note the holder will present it to the maker for payment; and if thereupon the maker shall neglect or refuse to pay it, and the holder will give reasonable notice to the indorser, he will pay it himself: *Sandford v. Dillaway*, 10 Id. 52 [6 Am. Dec. 99]; *Farnum v. Fowle*, 12 Id. 89 [7 Am. Dec. 35]. These are the conditions of his liability. The holder, therefore, to charge the indorser, must show a compliance with these conditions, or that proper means have been taken to effect a compliance with them, unless, indeed, he can prove a waiver of them by the indorser. And this, we think, is the rule as now settled: *Granite Bank v. Ayers*, 16 Pick. 392 [28 Am. Dec. 253]; *Lee Bank v. Spencer*, 6 Met. 308 [39 Am. Dec. 734]. If the maker has left the state, the holder must demand payment at his actual or last place of abode or of business within the state: *Wheeler v. Field*, Id. 290.

But upon the other point the court are of opinion that the notice was insufficient. The note was not, by its terms, made payable at any bank, nor was it placed in any bank for collection. The reference, therefore, to usual bank hours has no effect. When a note is, by its terms or by established usage, payable at a bank, it is payable in the usual course of business. All parties are presumed to take notice of the usual hours at which the bank is open. After the expiration of those hours the time for payment has expired, and the maker is in default. Thus, if a notice is given by the cashier, or if by the tenor of the notice it appears that the note has been placed in the bank for collection and has remained there unpaid till after the usual hours of business have passed, this is notice of dishonor. But this rule has no application to a note not payable at a bank, by its terms or by usage, and not placed in any bank for collection.

The rule in regard to notes like the one in question is, that the note is payable at any time on actual demand, on the last day of grace, and if such actual presentment and demand is so made and payment is not made, the maker is in default, and notice of dishonor may forthwith be given to the indorser. But if no presentment or demand is made by the holder upon the

maker, the latter is not in default till the end of the business day. Notice, therefore, from the holder to the indorser, at two o'clock of that day, that the note was unpaid and that the holder looks to the indorser for payment, is not due notice that the maker is in default, and that the note is dishonored: *Pinkham v. Macy*, 9 Met. 174. Similar decisions have recently been made in England: *Furze v. Sharwood*, 2 Ad. & El., N. S., 388; *King v. Bickley*, Id. 419; *Robson v. Curlewis*, Id. 421.

Exceptions sustained; new trial in this court.

DEMAND OF PAYMENT, WHETHER NECESSARY WHERE MAKER ABSCONDS.—It is generally held that no demand is necessary in order to charge the indorser: *Putnam v. Sullivan*, 3 Am. Dec. 206; *Lehman v. Jones*, 37 Id. 455; *Taylor v. Snyder*, 45 Id. 457; but see *Granite Bank v. Ayers*, 28 Id. 253; *Lee Bank v. Spencer*, 39 Id. 734, 735. Some of these decisions are discussed in the principal case. As to a mere removal excusing a demand, see *Anderson v. Drake*, 7 Id. 442; *Galpin v. Hard*, 15 Id. 640; *Gist v. Lybrand*, 17 Id. 595; *Lehman v. Jones*, 37 Id. 455; *Taylor v. Snyder*, 45 Id. 457.

NOTICE OF NON-PAYMENT, AT WHAT TIME TO BE GIVEN INDORSER: *Whitwell v. Johnson*, 9 Am. Dec. 165; *Shed v. Brett*, 11 Id. 209, and note; *State Bank of Elizabeth v. Ayers*, Id. 535; *Bank of Columbia v. Magruder*, 14 Id. 271; *Bank of the United States v. Merle*, 38 Id. 201; *Beckwith v. Smith*, Id. 290; *Gilbert v. Dennis*, Id. 329; *Downs v. Planters Bank*, 40 Id. 92; *Chick v. Pillsbury*, 41 Id. 394; *Etting v. Schuylkill Bank*, 44 Id. 205; *Mudd v. Harper*, 54 Id. 644. The holder of negotiable paper may make a demand at any reasonable time and place on the last day of grace, and if the paper is not paid, the holder may give notice to the indorser, or commence suit against the maker or acceptor; but if no such demand is made, the maker or acceptor has the whole day in which to make payment: *Gordon v. Parmelee*, 15 Gray, 419; *Exchange Bank v. Bank of North America*, 132 Mass. 148, both citing the principal case.

ASHWORTH v. KITTRIDGE.

[12 CUSHING, 193.]

PLAINTIFF'S EVIDENCE IN REPLY MAY BE RECEIVED OR NOT, in the discretion of the presiding judge.

MEDICAL BOOKS CAN NOT BE READ TO JURY against the objection of the other side, even if it be said that only such works of good and established authority should be read.

ACTION against a surgeon for negligence in the treatment of the plaintiff. If the rulings of the presiding judge are correct, judgment is to be entered on the verdict for the plaintiff; otherwise the verdict is to be set aside and a new trial granted. The facts are stated in the opinion.

B. F. Butler, for the plaintiff.

J. G. Abbott, for the defendant.

By Court, SHAW, C. J. In an action against a surgeon for neglect and want of competent skill in the treatment of the plaintiff, by means of which the plaintiff lost his arm, the plaintiff put in his evidence to show what was his own condition and the treatment by the defendant, and both parties offered evidence of the opinions of physicians and surgeons as experts. In reply, the plaintiff recalled some of his witnesses, and offered other evidence, which was objected to as not admissible at that stage. It is not always easy to determine in such cases whether the evidence is strictly original or rebutting; but we consider that it is for the judge in his discretion to determine whether such evidence shall be received or not: *Cushing v. Billings*, 2 Cush. 158. It may be proper to remark, that the rule of practice requiring the plaintiff to put in the whole of the evidence on which he intends to rely is peculiarly important to be adhered to in a case like the present, wherein professional witnesses are called to give opinions upon the case thus made.

But upon the other point the court are of opinion that it was not competent for the counsel for the plaintiff, against the objection of the other side, to read medical books to the jury. It was formerly practiced rather by general indulgence and tacit consent of parties than in pursuance of any rule of law; but it has been frequently decided that it is not admissible, and we now consider the law to this effect well settled both upon principle and authority. Where books are thus offered, they are in effect used as evidence, and the substantial objection is, that they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination. If the same author were cross-examined, and called to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical authors, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when perhaps the same opinion may have been vigorously contested, and perhaps triumphantly overthrown, by other medical authors, but authors whose works would not be likely to be known to counsel or client, or to court or jury.

Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in

a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience. If it be said that no books should be read except works of good and established authority, the difficulty at once arises as to the question what constitutes "good authority;" more especially whether it is a question of competency to be decided by the court, whether any particular book shall be received or rejected; or a question of weight of testimony, so that any book may be read, leaving its weight, force, and effect to the jury. Either of the alternatives would be attended with obvious, if not insuperable, objections.

Exceptions sustained.

MEDICAL AND SCIENTIFIC WORKS AS EVIDENCE AND AUTHORITY IN COURTS OF LAW.—The rule is well settled that a scientific or medical expert will be permitted to give his opinions, although founded alone or in part upon his reading and study of books, and not derived entirely or at all from experience or observation: *Lawson on Expert Ev.* 176; *Rogers on Expert Test.*, secs. 20, 21, 166; 1 *Bish. Cr. Proc.*, sec. 1180; 2 *Id.*, sec. 686; *Collier v. Simpson*, 5 *Car. & P.* 73; *State v. Wood*, 53 *N. H.* 484; *Central R. R. v. Mitchell*, 63 *Ga.* 173; *State v. Terrell*, 12 *Rich.* 321, 328; *Carter v. State*, 2 *Ind.* 617. But it by no means follows that the books themselves are admissible in evidence. It is the object of this note to inquire into the admissibility of such works.

MEDICAL WORKS AS EVIDENCE AND AUTHORITY.—The prevailing general doctrine unquestionably is that medical works, or works on medical jurisprudence, even of standard authority, are not admissible in evidence of the facts they contain, nor for the purpose of corroborating or discrediting the testimony of expert witnesses: 1 *Greenl. Ev.*, sec. 440, notes; 2 *Bish. Cr. Proc.*, sec. 686; *Whart. Cr. Ev.*, sec. 538; 1 *Whart. Ev.*, sec. 665; 2 *Tayl. Ev.* 1279; *Lawson on Expert Ev.* 169; *Rogers on Expert Test.*, sec. 166 et seq.; *Collier v. Simpson*, 5 *Car. & P.* 73; *Regina v. Taylor*, 13 *Cox C. C.* 77; *Ware v. Ware*, 8 *Me.* 42, 56; *Harris v. Panama R. R.*, 3 *Bosw.* 7, 18; *Carter v. State*, 2 *Ind.* 617; *Barrick v. City of Detroit*, 1 *Mich. N. P.* 134; *People v. Hall*, 48 *Mich.* 482; *S. C.*, 42 *Am. Rep.* 477; *Fowler v. Lewis*, 25 *Tex. (Supp.)* 380; *State v. O'Brien*, 7 *R. I.* 336; *Knoll v. State*, 55 *Wis.* 249; *Tucker v. Donald*, 60 *Miss.* 460; *S. C.*, 45 *Am. Rep.* 416; *Robinson v. N. Y. C. & H. R. R.*, 24 *Alb. L. J.* 357; *Commonwealth v. Wilson*, 1 *Gray*, 337; *Commonwealth v. Brown*, 121 *Mass.* 69, 81; and see *Dole v. Johnson*, 50 *N. H.* 452, 456, 458; *Ordway v. Haynes*, *Id.* 159. This doctrine is also laid down, and the principal case cited in its support, in the following cases: *Washburn v.*

Cuddihy, 8 Gray, 430, 431; *Huffman v. Click*, 77 N. C. 55, 59; *Gale v. Rector*, 5 Ill. App. 481, 484; *Stilling v. Town of Thorp*, 54 Wis. 528, 535; S. C., 41 Am. Rep. 60. The reasons generally given for the exclusion of such evidence, as laid down by the principal case, are that the authors do not write under oath, and the statements are made by one not present and subject to cross-examination.

In *Huffman v. Click*, 77 N. C. 55, Bynum, J., thus argues: "But if medicine is a science (and it claims to be such), it belongs to that class called 'inductive sciences.' Such treatises are based on *data* constantly shifting with new discoveries and more accurate observation, so that what is considered a sound induction to-day becomes an unsound one to-morrow. The medical work which was 'a standard' last year becomes obsolete this year. Even a second edition of the work of the same author is so changed by the subsequent discovery and grouping together of new facts, that what appeared to be a logical deduction in the first edition becomes an unsound one in the next. So that the same author at one period may be cited against himself at another. The authors of such works do not write under oath; the books themselves are therefore often speculative, sometimes mere compilations, the lowest form of secondary evidence; and as the authors can not be examined under oath, the authorities on which they rely can not be investigated, nor their process of reasoning be tested by cross-examination, such writings are nothing more or less than hearsay proof of that which living witnesses could be produced to prove;" see also, to the same effect, *Lawson on Expert Ev.* 170. In *People v. Hall*, 48 Mich. 482; S. C., 42 Am. Rep. 577, Campbell, J., says: "Scientific or expert testimony must be given by living witnesses, who can be cross-examined concerning their means of knowledge, and can explain, in language open to general comprehension, what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary jurymen or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them. Every one knows the inability of ordinary persons to understand or discriminate between symptoms and groups of symptoms, which can always be described to those who have not seen them, and which, with slight changes and combinations, mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safely trusted with the interpretation of such books, it is hard to see upon what principle living witnesses would be required. Scientific men are supposed to be able, from their study and experience, to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new discoveries in most matters of science, and the necessary assumption by scientific writers of some technical knowledge in their readers, render the use of such works before juries, especially in detached portions and selected passages, not only misleading, but dangerous. The weight of authority, as of reason, is against their reception."

The reasoning of these authorities would seem to be conclusive against the admission of medical works in evidence; and what can not be done directly ought not to be done indirectly, by permitting counsel to read from such books in their argument to the jury. Thus in *Regina v. Crouch*, 1 Cox C. C.

94, Alderson, B., says: "You surely can not contend that you may give the book in evidence, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?" So in *Huffman v. Click*, *supra*, it is said: "It sounds plausible to say you do not read it as evidence, but that you adopt it as part of your argument. But in so doing the counsel really obtains from it all the benefits of substantive evidence, fortified by its 'standard' character. He first proves by the medical expert that the work is one of high character and authority in the profession, and then he says to the jury, 'Here is a book of high standing, written by one who has devoted his talents to the study and explanation of this special subject of nervous diseases. He expresses my views with so much more force than I can, that I will read an extract from his work, and adopt it as a part of my argument.' It is evident the effect of this maneuver is to corroborate the evidence of the medical expert, or other witnesses, by the authority of a great name testifying, but not under oath, to the same thing as the expert, but with this difference, that the author has not heard the evidence upon which the expert based his opinion." See also, as sustaining these views, *Boyle v. State*, 57 Wis. 472, 480; S. C., 46 Am. Rep. 41; *Washburn v. Cuddihy*, 8 Gray, 430, 431, both citing the principal case; *Fraser v. Jennison*, 42 Mich. 206, 214; *People v. Wheeler*, 60 Cal. 581, 585; S. C., 44 Am. Rep. 70; *Robinson v. N. Y. C. & H. R. R.*, 24 Alb. L. J. 357. But in *Yoe v. People*, 49 Ill. 410, 412, it is held that if the attorney for the state in his argument to the jury read from a medical book, it is the duty of the court to charge that such books are not evidence, but theories simply of medical men; but it was further held in this case that it was error for the court to permit to be used in evidence against the prisoner the testimony of a professor of chemistry given in another state and trial, and reported in Parker's Criminal Reports, as no opportunity could be had to cross-examine the witness, or to meet his testimony by other evidence. In *People v. Wheeler*, 60 Cal. 581; S. C., 44 Am. Rep. 70, McKinstry, J., gives the reasoning and comments upon many cases to show that medical works, even of standard authority, are not admissible in evidence, and can not be read by counsel to the jury, quoting extensively from the principal case (p. 587) to this effect; but he afterwards lays great stress upon the fact that no evidence was introduced below to show that the work read was a standard. Thus he says: "Our conclusion is that the court below erred in permitting the district attorney, in his closing argument to the jury, in the absence of any evidence that the work was of recognized authority in the medical profession, and against the objection of counsel for the defendant, to read from Browne's Medical Jurisprudence of Insanity 'various sections treating of the subject of insanity, and sustaining the prosecution's theory of the case.'" McKee, J., concurred, on the ground that the book "was not proved to be a recognized or scientific work or standard authority—was not offered in evidence in the case, nor made part of the testimony of any of the witnesses examined." The court here, in attaching the weight it did to the fact that the work was not shown to be of standard authority, seems to have overlooked the theory which rejects such works entirely, and does not permit them to be read to the jury. An existing statute of California, however, which seems to sustain the views of the court, will be hereafter referred to. The courts of those states which deny the right to introduce medical works in evidence as the opinions of experts, either to prove certain facts or to corroborate or discredit the testimony of expert witnesses, are extremely cautious about the invasion of the rule. Thus it is held to be error to per-

mit a witness to testify as to what is said in standard medical works: *Boyle v. State*, 57 Wis. 472; S. C., 46 Am. Rep. 41; and books on medical jurisprudence can not be read by a witness to the jury, although the witness is an expert and concurs in the views therein expressed: *Commonwealth v. Sturdivant*, 117 Mass. 122, 139; S. C., 19 Am. Rep. 401, citing the principal case; see also *Commonwealth v. Brown*, 121 Id. 69, 81. So also counsel will not be permitted to put a passage from a medical work before the jury in an indirect way by reading it to an expert and asking him whether what had been read stated the facts therein set forth: *Marshall v. Brown*, 50 Mich. 148; and in *Melvin v. Easley*, 1 Jones L. 386, it was held to be error for the trial judge, in an action for breach of warranty of a horse, to give medical works the effect of evidence, by stating in his charge that he had looked into a book on farriery referred to, but not read, by counsel in his argument, and had found there under a certain head that certain symptoms were indicative of a certain disease. But it is held that if experts refer to particular medical works as authority for certain propositions, such books may be read in evidence for the purpose of discrediting their testimony: *City of Ripon v. Bittel*, 30 Wis. 614, 619; *Pinney v. Cahill*, 48 Mich. 584. This, however, is denied in *Davis v. State*, 38 Md. 15, 36.

The grounds of this exception are thus clearly stated by Graves, C. J., in *Pinney v. Cahill*, *supra*: "The rule is acknowledged in this state that medical books are not admissible as a substantive medium of proof of the facts they set forth. But the matter in question was not adduced with any such view. The witness assumed to be a person versed in veterinary science; to be familiar with the best books which treat of it, and among others with the work of Dodd. He professed himself qualified to give an opinion to the jury from the witness-stand on the ailment of the plaintiff's horse and its cause, and the drift of his opinion was to connect the defendant with that ailment. He borrowed credit for the accuracy of his statement by referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances, it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness and enable the jury to see that the book did not contain what he had ascribed to it. The final purpose was to disparage the opinion of the witness and hinder the jury from being imposed upon by a false light. The case is a clear exception to the rule which forbids the reading of books of inductive science as affirmative evidence of the facts treated of." In *Connecticut Mut. L. Ins. Co. v. Ellis*, 89 Ill. 516, it was held that where a physician, as a witness, testified to the symptoms of a disease of which a person whose life was insured had died, and pronounced it *delirium tremens*, paragraphs from standard authors, treating of that disease, might on cross-examination be read to the witness, and the question asked whether he agreed with the authors, as a means of testing his knowledge; and this was held to be in no just sense reading books to the jury as evidence, or for the purpose of contradicting the witness; but it is added, "Great care should always be taken by the court to confine such cross-examination within reasonable limits, and to see that the quotations read to the witness are so fairly selected as to present the author's views on the subject of the examination." It may be said of this case, in passing, that it seems to carry the exception to its extreme limits; and it is held in a subsequent Wisconsin case, that if the witness does not refer to any medical work, and does not rely upon the authority of medical writers to support his views, but testifies from his own knowledge and experience, it is not proper to read from medical books to contradict him: *Knoll v. State*, 55 Wis. 249.

Notwithstanding this array of authorities, the decisions are not unanimous on the proposition that medical works are not admissible in evidence. Thus the courts of Iowa and Alabama hold that standard medical works may be admitted, with proper explanations, when necessary, of the terms used: *Bowman v. Woods*, 1 G. Greene, 441; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Merkle v. State*, 37 Id. 139; *Bales v. State*, 63 Id. 30. In *Stoudenmeier v. Williamson*, the court say, in following *Bowman v. Woods*: "We think that medical authors, whose books are admitted or proven to be standard works with that profession, ought to be received in evidence. Should such works be obscure to the uninitiated, or should they contain technicalities or phrases not understood by the common public, proper explanation should be offered, lest the jury should be thereby misled. That was done in this case. The opinions of physicians as experts, touching disease and the science of medicine, are, under all authorities, admissible in evidence. If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits. The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system and its diseases. Professional knowledge is, in a great degree, derived from the books of the particular profession. In every step the practitioner takes, he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and molded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from books and our association with men. It is the boast of this age of advancing civilization that, aided and facilitated by the printer's art, the collected learning of past ages has been transmitted to us. Shall we withhold the benefits of this heritage from the contests of the court-room? We think not. Evidence drawn from this source being admissible, the question arises, In what form is it to be laid before the jury? Are opinions derived from the perusal of books, and deposed to by witnesses, safer guides for that body than the books themselves are?" So in Connecticut a long-established practice is held to have fixed the rule that counsel may read to the jury as a part of their argument extracts from authoritative medical and other treatises: *State v. Hoyt*, 46 Conn. 330, 337; but Loomis, J., dissented from this proposition, quoting extensively (page 341) from the principal case in support of the opposite view.

In Indiana it was held not error for the court to permit counsel during his argument to read extracts from Wharton's Medical Jurisprudence, when the court informs the jury "that the extract was to be regarded not in any wise as evidence, that counsel was permitted to read it as part of his argument, and they were to consider it only as such:" *Harvey v. State*, 40 Ind. 516. This case was disapproved in *People v. Wheeler, supra*, and it may be well to notice in this connection the earlier case of *Carter v. State*, 2 Ind. 617, in which it was held that medical books are not admissible in evidence. The Iowa code (1880), sec. 3653, contains the following, passed since the decision of *Bowman v. Woods, supra*: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest;" and a similar provision is found in the California code of civil procedure, sec. 1936. Cole, J., in *Broadhead v. Wiltse*, 35 Iowa, 429, in answering an objection that under this section the works, rather than the testimony of experts as to

what such works approve, are the best evidence, says: "Without now deciding what may be the proper construction of this section, as applied to the respective topics named in it, we have no hesitation in holding that it is not restrictive in its effect, but rather to extend. It does not make inadmissible any evidence which before was admissible, and therefore it does not affect the question involved in the ruling of the district court excepted to as above. Before the enactment of the above statute, books of science were not generally (if they ever were) regarded as competent evidence. The fact that they are, by force of statute, now made competent, would not render other competent testimony now incompetent. Hence, standard surgical authorities are not the best evidence as to what they teach or whether they differ." The section of the California code was not referred to, in terms, by the court in *People v. Wheeler*, *supra*, and whether the judges had it in mind in deciding that case it is impossible to say, although Mr. Justice McKee observes: "Books of science or art are *prima facie* evidence of facts of general notoriety and interest;" and his entire concurring opinion seems to be also otherwise consistent with the idea of the provision. Even, however, under the statute, the Iowa courts hold that scientific works offered in evidence in the trial of a criminal action can not be taken by the jury to their room when they retire to agree upon their verdict: *State v. Gillick*, 10 Iowa, 98.

In addition to the foregoing views, certain early cases regarded the matter of reading medical works to the jury, either as evidence or in the argument of counsel, as resting in the discretion of the court, and therefore, a refusal was not the subject of error, or a ground for reversal: *Luning v. State*, 2 Pinn. 215; S. C., 1 Chand. 270; 52 Am. Dec. 153; *Legg v. Drake*, 1 Ohio St. 287; *Wade v. De Witt*, 20 Tex. 398. The recent Wisconsin cases seem to be entirely inconsistent with such a holding: See *Stilling v. Town of Thorp*, 54 Wis. 528; S. C., 41 Am. Rep. 60; *Knoll v. State*, 55 Id. 249; *Boyle v. State*, 57 Id. 472; S. C., 46 Am. Rep. 41, referred to *supra*; as does the Texas case of *Fowler v. Lewis*, 25 Tex. (Supp.) 380, in which no reference was made to *Wade v. De Witt*.

MISCELLANEOUS SCIENTIFIC WORKS AS EVIDENCE AND AUTHORITY.—The foregoing rules as to the admissibility of medical works in evidence apply to similar scientific works in general: 1 Greenl. Ev., sec. 440, notes; 1 Bish. Cr. Proc., sec. 1180; 2 Id., sec. 686; Whart. Cr. Ev., sec. 538; 1 Whart. Ev., sec. 665; Lawson on Expert Ev. 169. Thus Mr. Wharton, in his work on criminal evidence, sec. 538, says: "Treatises on such of the inductive sciences as are based on *data* which each successive year corrects and expands, must be refused admission when offered to prove the truth of facts contained in such treatises." But works of exact science are admissible: Lawson on Expert Ev. 174; Rogers on Expert Test., sec. 167. This distinction is thus stated by Chalmers, J., in *Tucker v. Donald*, 60 Miss. 460, 470; S. C., 45 Am. Rep. 416: "There is a class of books which are admitted before the jury as primary evidence; but these are such as relate to sciences deemed exact, or such as by long use in the practical affairs of life have come to be accepted as standard and unvarying authority in determining the action of those who used them. To the first class belong almanacs, astronomical calculations, tables of logarithms, and the like; to the second, tables of life expectations in matters of insurance." The following are cases under these rules: Almanacs are admissible to show the time when the sun or moon rose or set on a certain day: *State v. Morris*, 47 Conn. 179; *Munshower v. State*, 55 Md. 11; but see *Tutten v. Darke*, 5 H. & N. 647, as to how far almanacs are admissible in England. In *People v. Chee Kee*, 61 Cal. 404, where it

was sought to prove the time when the sun rose on a certain day by reading from an almanac, it was held that the fact was one of those of which a court may take judicial notice, and formal proof of it was therefore unnecessary. It would have been sufficient to have called it to the knowledge of the judge at the trial, and if his memory was at fault, or his information not sufficiently full and precise to induce him to act upon it, he had the right to resort to an almanac or any other book of reference to satisfy himself about it. A record of the weather, kept for a number of years at a state insane asylum, is competent evidence to prove the temperature on a given day included in such record: *De Armand v. Neasmith*, 32 Mich. 231.

To prove the state of the tide, Blunt's Coast Pilot and Bowditch's Navigation are admissible in evidence, and are of equal validity with the almanac: *Green v. Cornwell*, 1 City H. Rec. 11, 14. The Northampton tables are competent evidence upon the question of the probable duration of human life: *Schell v. Plumb*, 55 N. Y. 598; *Sauter v. New York Cent. etc. R. R.*, 66 Id. 50; *Georgia R. R. etc. Co. v. Oaks*, 52 Ga. 410; and see *Wager v. Schuyler*, 1 Wend. 553; *Jackson v. Edwards*, 7 Paige, 386; S. C., 22 Wend. 498; as are Dr. Wigglesworth's tables: *Mills v. Catlin*, 22 Vt. 98; and see *Eastabrook v. Hapgood*, 10 Mass. 313; *Alexander's Ex'x v. Bradley*, 3 Bush, 667; so are the Carlisle tables: *Rowley v. London & N. W. R'y*, L. R., 8 Ex., 221, 226; *Donaldson v. Mississippi etc. R. R.*, 18 Iowa, 280, 291; and see *Greer v. Mayor etc. of New York*, 1 Abb. Pr. 206; S. C., 4 Robt. 675. But the Carlisle tables will not be used where the rules will work manifest injustice: *Shippen's Appeal*, 2 Week. Not. Cas. 468; and in an action for injuries not resulting in death, they are immaterial, and should be excluded: *Nelson v. C. R. I. & P. R. R.*, 38 Iowa, 564. But a book entitled "The Principles and Practice of Life Insurance," containing rules and modes of calculating and adjusting life insurance, is inadmissible: *Mutual Life Ins. Co. v. Bratt*, 55 Md. 200. So where the matter is not pertinent to the subject of inquiry, counsel can not read, in an action against a life insurance company, "in illustration of his argument," a pamphlet entitled "Qualities of a Good Agent:" *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201; S. C., 38 Am. Rep. 573, in which the court approved of the early case of *Legg v. Drake*, 1 Ohio St. 286. To prove the worthlessness of a bank bill, pamphlets commonly known as "Bank-note Detectors" are inadmissible: *Payson v. Everett*, 12 Minn. 216, 219; the court saying that such pamphlets stood "upon no better footing than the opinions or statements of medical writers, even of standard reputation, which are not allowed to be read to a jury," citing the principal case to this point. Where a policy of marine insurance prohibited a vessel from visiting "guano islands," and the question was, whether a certain island at which the vessel stopped was a "guano island," an article in Appleton's American Cyclopædia can not be read to the jury on this point: *Whiton v. Albany City Ins. Co.*, 109 Mass. 24. In Iowa it was held, in an action for damages by the owner of a thoroughbred cow against the owner of an unpedigreed bull, which being allowed to run at large had got the plaintiff's cow with calf, a book known as the "American Herd-book" was inadmissible to show the registry of the cow therein, without proof that the book was recognized by cattle-breeders, and that the plaintiff's cow was the one registered therein under the same name: *Crawford v. Williams*, 48 Iowa, 249. See, in this connection, the Iowa cases and *People v. Wheeler*, commented upon *supra*. In *Cory v. Silcox*, 6 Ind. 39, counsel, in an action for backing water by a dam and injuring the plaintiff's mill, was allowed in his closing argument to the jury to read from "Evan's Millwright Guide," the court charging that "extracts read from

a scientific work are not of authority conclusively or *prima facie*. Like argument of counsel, or any other thing adduced to illustrate, they may be satisfactory to the jury, or they may not;" and this was approved on appeal. As to the right of counsel to read law to the jury, there is some difference of opinion: See *Cocks v. Purday*, 2 Car. & Kir. 269; *People v. Anderson*, 44 Cal. 65; *McMath v. State*, 55 Ga. 303; *Curtis v. State*, 36 Ark. 284.

THE PRINCIPAL CASE WAS ALSO CITED in *Corey v. Janes*, 15 Gray, 545, to the point that the refusal of a judge to allow a party to introduce evidence in corroboration of other evidence previously introduced by him, after the other party has given evidence tending to rebut it, is within his discretion, and not a legal ground of exception.

RAY v. THOMPSON.

[12 CUSHING, 281.]

SALE ON CONDITION THAT VENDEE MAY RETURN CHATTEL IN SPECIFIED TIME BECOMES ABSOLUTE, and the obligation to pay the price becomes unconditional, if during that time the vendee disables himself from performing the condition by substantially injuring the chattel.

ASSUMPSIT for the price of a horse. The defendant set up that the sale was on condition that he might return the horse within a specified time if not satisfactory, and that the horse was so returned. The plaintiff at the trial offered to prove that during the time limited for the return the defendant so abused the horse that he was materially injured and lessened in value, and that therefore the plaintiff refused to accept him in return; but this evidence was rejected. Verdict for the defendant, and exceptions by the plaintiff to the ruling.

J. W. Bacon, for the plaintiff.

G. A. Somerby, for the defendant.

By COURT. The evidence offered by the plaintiff ought to have been admitted to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition by returning the horse. The sale was on a condition subsequent; that is, on condition he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant in the mean time disabled himself from performing the condition—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled—then the sale became absolute, the obligation to pay the price became uncon-

ditional, and the plaintiff might declare as upon an *indebitatus assumpsit* without setting out the conditional contract: *Moss v. Sweet*, 3 Eng. L. & Eq. 311; S. C., 16 Ad. & El., N. S., 493.

New trial ordered.

CONDITIONAL SALE BECOMES ABSOLUTE on vendee's or vendor's failure to comply with conditions of sale: See *Munnerlin v. Birmingham*, 34 Am. Dec 402; *Dewey v. Erie Borough*, 53 Id. 533.

WILSON v. GENERAL MUTUAL INSURANCE COMPANY.

[12 CUSHING, 360.]

BARRATRY IS FRAUDULENT AND INJURIOUS CONDUCT BY MASTER, acting in the relation of master to the owners, contrary to the orders and instructions, against the interest and rights of the owners, and without their consent.

INSURANCE AGAINST BARRATRY OF MASTER DOES NOT COVER LOSS through the fraud and misconduct of such master, where he is himself part owner of the vessel. Barratry can not be committed by a master who is himself a part owner.

ASSUMPSIT on a policy of insurance. A nonsuit was directed, subject to the opinion of the whole court. The facts are stated in the opinion.

T. G. Coffin and T. D. Eliot, for the plaintiff.

J. H. Clifford, for the defendants.

By Court, SHAW, C. J. *Assumpsit* on a policy of insurance by Wilson, for himself and whom it may concern, on the bark Harriet and outfits, on a whaling voyage from Freetown, during her cruising, etc., until her return to Freetown. The ground of loss relied on was the barratry of the master.

On opening the cause, it appeared that Joseph Durfee, the master for the voyage, was part owner of the vessel, and indeed, his name appears upon the policy as one of the persons for whom the insurance was made. No other loss being charged within the perils insured against, except barratry of the master, a nonsuit was directed, subject to the opinion of the court, on the ground that barratry could not be committed by the master so as to charge the underwriters with the loss, if the master was himself part owner of the vessel. A motion is now made to set aside the nonsuit, because such direction was incorrect in point of law, and this motion has been argued by counsel.

Had this been a Boston policy the question could hardly have

arisen, because we believe these policies have long contained a clause by which barratry of the master is included amongst the perils insured against, but qualified with this limitation, "unless the assured are owners of the vessel." But this is said to be a policy in the New York form, in which barratry of the master is insured against in general terms, without any such exception or qualification.

This being a policy in which loss by barratry of the master is one of the perils insured against, the only question is whether a master, who is himself part owner, can commit barratry. It is conceded that if he were sole owner he could not commit barratry, and although he may commit various wrongful, fraudulent, illegal, and injurious acts affecting the rights of shippers of goods, consignees, and others, still it would not be barratry; because barratry, *ex vi termini*, as used in English and American policies, means fraudulent and injurious conduct by the master, acting in the relation of master to the owner, contrary to the orders and instructions, against the interest and rights of the owners, and without their consent; which can not be done if he is owner as well as master. He can not commit a fraud upon himself, he can not act without his own knowledge and consent, and therefore can not commit barratry; but it is contended that the same reasons do not exist where the master is part owner only.

No case has been cited, English or American, it is believed, which warrants this distinction, nor do we think it warranted by the principles which govern the rights of parties in regard to barratry, as a peril insured against. Perhaps there is no reason, *a priori*, why those who have policies on cargo or on goods, and who have no voice in the appointment or removal of the master, or giving him authoritative instructions respecting the navigation of the ship and the conduct of the voyage, should not be insured as well against the fraud and misconduct of the master in all cases as against the like conduct of the master where he does not happen to be owner; but the distinction has been long established, is well understood, and therefore constitutes a part of the contract of insurance. In the last case it is barratry, and therefore it is insured against by the words of the policy; in the former it is not barratry, and consequently the underwriter is not liable for it.

The subject of loss by barratry of the master, as a peril insured against, was recently considered in the case of *Lawton v. Sun Mutual Ins. Co.*, 2 Cush. 500, in which most of the authori-

ties on the subject were cited in the arguments of counsel, except the recent work of Arnould, since published. It is therefore unnecessary to cite the familiar definitions of barratry at length: one or two only will be sufficient. In *Nutt v. Bourdieu*, 1 T. R. 323, it is defined: "Something criminal, committed against the owner by the master or mariners." In *Earle v. Rowcroft*, 8 East, 126, it is said that in marine insurance, barratry is founded "in the particular relation which subsists between master, mariners, and owners, by which a loss may happen to the subject-matter." In *Vallejo v. Wheeler*, 1 Cowp. 143, the act of the master was held to be barratry, because he was acting for his own benefit, without the consent and privity of the owner. Acting for his own interest and against the interest of his owner may be a strong circumstance tending to prove barratry, but is not an essential ingredient in that fraud or misconduct towards the owner which constitutes barratry, but it must be without his consent or privity.

All the cases of barratry presuppose two distinct parties, that of owner and master of a vessel, between whom certain relations subsist; and that out of this relation grow certain mutual rights, duties, and obligations; and barratry is a violation on the part of the master of some of these duties and obligations, by fraud or misconduct, from which a loss ensues, either of vessel or goods. Against these losses, by the terms of the policy, the underwriter insures; but against similar wrongs, even if they go to the extent of running away with vessel and cargo, if the master be owner, the underwriters are not responsible; or if the acts are done with the authority or under the express directions of the owners, the underwriters are not responsible simply because they are not barratry, though equally injurious to third parties. The violation of their relative duties being of the essence of barratry, we think it can not be committed by a master who is part owner. Both relations of master and owner uniting in him, he can not commit barratry, because he can not commit any act without his own consent and privity.

It was urged in the argument, as a reason why the part owner and not the master should be allowed to recover in this case, that the interests of part owners in a vessel are not joint but several, that there is no legal privity between them, and they are to stand as if they owned by separate titles. But we apprehend this is mistaking the principle on which the rule is founded. Separate owners of goods have no joint interest with each other or with the vessel; they have no voice in the appoint-

ment or removal of the master, and yet, being insured against barratry, their rights are governed by the same rules as those of ship-owners insured against the same peril. If the malversation amounts to barratry, they may recover, otherwise not; and the question whether it is barratry or not depends on the same consideration, viz., whether there is a violation of duty in relation of master to owners.

We have said that we are not aware of any decided case directly in point; we believe that the precise point has not been discussed or drawn in question in any case. But the fact can hardly be said to be without authority. In the leading case, *Nutt v. Bourdieu*, 1 T. R. 323, it is pointedly stated by Lord Mansfield that an owner can not commit barratry. He may make himself liable for his fraudulent conduct to the owner of the goods, but not as for barratry. Mr. Arnould, in his excellent treatise on insurance, says, after stating by and against whom barratry may be committed: "Upon the same principle, it is clear that barratry can not be committed by a master who is owner or part owner of the vessel:" 2 Arnould on Ins. 837; and he cites *Ross v. Hunter*, 4 T. R. 33, and *Marcardier v. Chesapeake Ins. Co.*, 8 Cranch, 39; 1 Phill. Ins., sec. 1082.

It was said in the argument that the authorities cited do not warrant the conclusion stated in the text, because they were not the case of a part owner and master, in a case charging barratry. We are inclined to think that this is correct; the passages, therefore, can only be regarded as an application of the principle to this particular case by writers who have devoted much learning and time to the investigation of principles, and who have stated these as their results.

The court are therefore of opinion that the nonsuit was rightly ordered; the plaintiff, on his own showing, has no legal ground of action, and judgment must entered for the defendants.

BARRATRY, WHAT IS: See the definitions given in *Wilcocks v. Union Ins. Co.*, 4 Am. Dec. 480, and note; *Millandon v. New Orleans Ins. Co.*, 13 Id. 358. The act must be either fraudulent or criminal: *Wiggin v. Amory*, 7 Id. 175; and the resistance by the master and seamen of a neutral vessel to the search of a belligerent is barratry: *Brown v. Union Ins. Co.*, 5 Id. 123; so also barratry includes losses by larceny or embezzlement committed by the master or crew: *American Ins. Co. v. Bryan*, 37 Id. 278.

BARRATRY, WHETHER CAN BE COMMITTED BY MASTER WHO IS OWNER OR PART OWNER OF VESSEL.—The owner of a vessel can not commit barratry: See *Taggard v. Loring*, 8 Am. Dec. 140; *Millandon v. New Orleans Ins. Co.*, 13 Id. 358; and see *Parkhurst v. Gloucester Mutual Fishing Ins. Co.*, 100 Mass.

305, citing the principal case; but in *Cook v. Commercial Ins. Co.*, 6 Am. Dec. 353, it is held that barratry may be committed by the master of a ship in respect to the cargo, although the owner of the cargo is at the same time owner of the ship, and although the master is supercargo or consignee of the voyage. In England a different doctrine from that laid down in the principal case is maintained, and it is held that barratry may be committed by a master who is also part owner of the ship: *Jones v. Nicholson*, 10 Exch. 28.

DANIELS v. HUDSON RIVER FIRE INSURANCE CO.

[12 CUSHING, 416.]

CONTRACT OF INSURANCE IS TO BE INTERPRETED ACCORDING TO LAWS and with reference to the usages and practice of the state in which it is to take effect, by the counter-signature of the agent of the insurance company and the delivery of the policy by him, although the policy was dated in another state and signed by the president and secretary there.

WARRANTY IN CONTRACT OF INSURANCE MUST BE EMBRACED IN POLICY ITSELF, or be made in legal effect a part of the policy, by words of reference where the stipulation is contained in another instrument.

DIFFERENCE BETWEEN EFFECT OF WARRANTY AND REPRESENTATION IN INSURANCE IS, that if the statement of any fact, however unimportant, is a warranty, it avoids the policy if it happens to be untrue; but if it is a representation, and is untrue, the policy will not be avoided if it is not willful or if not material.

STIPULATIONS IN APPLICATIONS FOR INSURANCE ARE TO BE CONSIDERED REPRESENTATIONS rather than warranties, in all cases where there is any room for construction.

MISREPRESENTATION IN INSURANCE IS STATEMENT OF SOMETHING AS FACT which is untrue, and which the assured states, knowing it to be untrue, with an intent to deceive, or which he states positively as true without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk.

CONCEALMENT IN INSURANCE IS DESIGNED AND INTENTIONAL WITHHOLDING OF FACT MATERIAL TO RISK, which the assured in honesty and good faith ought to communicate.

FACT MUST BE REGARDED AS MATERIAL TO RISK in insurance when knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium.

BURDEN OF PROOF IS ON INSURANCE COMPANY TO SHOW FALSITY OF REPRESENTATION, or the failure to comply with an executory stipulation, as well as the materiality of the representation or stipulation to the risk; and it is a question for the jury in either aspect.

NEGLECT OF SERVANTS, WHEREBY REPRESENTATION OR STIPULATION IS NOT COMPLIED WITH, WILL NOT AVOID POLICY of fire insurance, unless, indeed, the habitual or frequent carelessness of such servants in performing their duties may become the negligence of the employers, whose duty it is to have a reasonable vigilance over and employ faithful servants.

EVIDENCE OF USAGE OF WORDS IN PECULIAR SENSE IN APPLICATION FOR INSURANCE IS ADMISSIBLE, where, although such words severally and as first read seem plain, an ambiguity becomes apparent when they are applied to the subject-matter; and it is for the jury to decide whether, according to the true meaning of the language used, a representation therein contained was substantially true when made, and substantially complied with afterwards.

GENERAL USE OF WORDS AMONG MANUFACTURERS NEED NOT BE KNOWN TO INSURERS to effect a contract of insurance on manufacturing property in which they are contained. The legal presumption is that the words were understood by the insurers.

INSURANCE EXPERT MAY BE ASKED WHETHER RISK WAS INCREASED by a partition in the basement of the insured building, and the necessity for another cask of water was thereby created, if there were openings in the partition of sufficient size to permit a cask to be easily rolled through, where water-casks were represented to be in each room, but were in fact only in each story.

INSURANCE EXPERT MAY BE QUESTIONED BY PLAINTIFF CONCERNING HIS EXAMINATION OF INSURED BUILDING for the insurance company and the objects the building then contained, in an action on a policy, for the purpose of proving the existence of the objects described in the application, and of showing his relation to the parties, and his means of observation and recollection.

ACTION ON A POLICY OF FIRE INSURANCE. The defendants relied upon a violation of the statements in the application, which they contended were warranties. These statements were in response to certain interrogatories, numbered 22 and 24, and are: "Is there a good forcing-pump in the factory, designed expressly for putting out fire, and at all times in condition for use?" Answer: "A small force-pump for filling barrels, and with hose to reach each room." Question: "Are there casks in each loft constantly supplied with water? If there are, what is their capacity, and how many buckets are kept to each cask for use in case of fire?" Answer: "There is in each room casks of forty-two gallons each, kept full constantly; also twenty-four buckets in mill." Certain evidence, appearing fully in the opinion, having been introduced by the defendants for the purpose of falsifying the statement in regard to there being a water-cask in each room, the plaintiffs were permitted, against the defendants' objection, to introduce evidence to show that an entire loft or story, devoted to a particular branch, although divided by partitions with doors, was known as one room, in the general use of language among manufacturers. The plaintiffs were also permitted to ask an expert, one Adams, whether a partition in the basement of the factory increased the risk, or created the necessity for another cask of

water, if there were openings in the partition of sufficient size to permit a cask to be easily rolled through; and he answered in the negative. The expert was further allowed to be asked by the plaintiffs if he had examined the factory when he received the application; if any part of the application was in his handwriting; if the objects described in the application were in the building when he examined it; if the force-pump was pointed out to him and its object stated; and if he was paid by the defendants' agent for making the examination and receiving the application; and this evidence was admitted for the purpose only of proving the existence in the factory of the objects described in the application, and of showing the relation of the witness to the parties to the action, and his means of observation and recollection; and not for the purpose of limiting or controlling the written application. The instructions given by the presiding judge, and certain portions of the policy material to the case, appear in the opinion. The plaintiffs had a verdict, and the defendants excepted.

R. Choate and J. J. Clarke, for the plaintiffs.

P. C. Bacon and D. Foster, for the defendants.

By Court, SHAW, C. J. This is an action of contract to recover on a policy of insurance made by the defendant company for a loss by fire. The insurance was upon the plaintiffs' factory building in Medway, and the machinery and stock. The defendant company have their office and principal place of business at Waterford, New York. The policy, for one year, purports to be dated there, and signed by the president and secretary; but the negotiation was had by an agent of the company in Massachusetts, and by the terms of the policy it was not to be valid unless countersigned by their agent at Worcester, and it was so countersigned and delivered by him. There can be no doubt that this is a contract made in Massachusetts, and to be governed and construed by the laws of this state; for though it was dated in New York and signed by the president and secretary there, yet it took effect as a contract from the counter-signature and delivery of the policy in Massachusetts. It is to be interpreted according to the laws and with reference to the usages and the practice of this state, in the same manner with any other Massachusetts policy of insurance against fire.

It came to trial before one of the justices of this court; several exceptions were taken by the defendants to the directions and

decisions of the judge. These are now brought before the whole court by bill of exceptions.

1. The defendants, relying upon a violation of the statements in the application, contended that these statements were warranties or conditions, and if they were not strictly and literally true at the time of the application, that the policy was void; and that if they were then true, and the plaintiffs afterwards ceased to comply with them, the policy thereupon became void, whether the same were or were not material to the risk. But the presiding judge instructed the jury that the statements of the application were not warranties requiring an exact and literal compliance, but that they were representations; and as such must have been substantially true and correct as to things done or existing at the time the policy was issued, and that so far as they related to the future—to things to be done, and rules and precautions to be observed—they were stipulations to be fairly and substantially complied with.

The court are of opinion that, looking at the policy and the application, this instruction was correct. There is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties, and what representations. One general rule is, that a warranty must be embraced in the policy itself. If by any words of reference the stipulation in another instrument, such as the proposal or application, can be construed a warranty, it must be such as make it in legal effect a part of the policy. In a recent case, it was said that "the proposal or declaration for insurance, when forming a part of the policy, has been held to amount to a condition or warranty, which must be strictly true or complied with, and upon the truth of which, whether a misstatement be intentional or not, the whole instrument depends:" *Vose v. The Eagle Life and Health Ins. Co.*, 6 Cush. 47. But no rule is laid down in that case for determining how or in what mode such statements, contained in the application or in answer to interrogatories, shall be embraced or incorporated into the policy so as to form part thereof.

The difference is most essential, as indicated in the definition of a warranty in the case last cited, and as stated by the counsel for the defendants in the prayer for instruction. If any statement of fact, however unimportant it may have been regarded by both parties to the contract, is a warranty, and it happens to be untrue, it avoids the policy; if it be construed a representation, and is untrue, it does not avoid the contract if

not willful or if not material. To illustrate this: the application, in answer to an interrogatory, is this: "Ashes are taken up and removed in iron hods;" whereas, it should turn out in evidence that ashes were taken up and removed in copper hods—perhaps a set recently obtained, and unknown to the owner. If this was a warranty, the policy is gone; but if a representation, it would not, we presume, affect the policy, because not willful or designed to deceive; but more especially because it would be utterly immaterial, and would not have influenced the mind of either party in making the contract or in fixing its terms. Hence it is, we suppose, that the leaning of all courts is to hold such a stipulation to be a representation rather than a warranty, in all cases where there is any room for construction; because such construction will, in general, best carry into effect the real intent and purpose which the parties have in view in making their contract.

In the present case, the only clause in the policy having any bearing upon this question is this: "And this policy is made and accepted in reference to the terms and conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for." Here is no reference whatever to the application or the answers accompanying it; the only reference is to the conditions annexed to the policy. In looking at these conditions, second clause of article 1, the provision is, that "if any person insuring any building or goods in this office shall make any misrepresentation or concealment, or, etc. [mentioning several other cases, all of which would tend to increase the risk], such insurance shall be void and of no effect."

The terms "misrepresentation" and "concealment" have a known and definite meaning in the law of insurance; and it is that meaning and sense in which we are to presume the parties intended to use them in their contract of insurance, unless there is something to indicate a different intent. "Misrepresentation" is the statement of something as fact which is untrue in fact, and which the assured states, knowing it to be not true, with an intent to deceive the underwriter, or which he states positively as true without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk. "Concealment" is the designed and intentional withholding of any fact material to the risk which the assured, in honesty and good faith, ought to communicate to the under-

writer; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment. *Aliud est celare, aliud tacere.* And every such fact untruly asserted or wrongfully suppressed must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. If the fact so untruly stated or purposely suppressed is not of this character, it is not a "misrepresentation" or "concealment," within this clause of the conditions annexed to the policy.

But further: the clause in this policy has none of the characteristics of a warranty, because it is not, in its own terms or by reference to the terms and conditions annexed, an absolute stipulation for the truth of any existing fact, or for the adoption of any precise course of conduct for the future, making the truth of such fact or a compliance with such stipulation a condition precedent to the validity of the contract, or the right of the assured to recover on it. The policy is made in reference to the terms and conditions annexed; but these are referred to, not as conditions precedent, but "to be used and resorted to in order to explain the rights and obligations of the parties hereto, in cases not herein otherwise specially provided for." They are not to control or alter any express provision in the contract, or become parts of the policy; but they are statements in a collateral document, which both parties agree to as an authoritative exposition of what they both understand as to the facts, on the assumption and truth of which they contract, and the relations in which they stand to each other.

The court are of opinion, therefore, that the statements in this application were not warranties, and could have no greater effect than that of representations, and that the judge was right in giving such instruction to the jury.

2. Another exception was taken to the direction of the judge in regard to the force-pump, which is, that the judge erroneously ruled that the burden of proof was on the defendants to prove its materiality to the risk, and also whether it had been complied with or not. This was correct. Whether the answer was responsive to the question or not, it could have only the character of a representation; and therefore, if the defendants rely either upon the falsity of the representation or the failure to comply with an executory stipulation, it is upon them to

prove it; and it is a question of fact for the jury in either aspect.

3. With respect to the representation and stipulation that a water-cask should be kept in each room, the presiding judge instructed the jury that if the plaintiffs established a rule that such water-casks should be kept full, and employed servants to execute such rule, and if, through their negligence at any time, they were not full, such negligence of servants would not avoid the policy.

We understand it to be a well-settled principle in the law of fire insurance, and indeed, the strong tendency of modern judicial decisions in cases of marine insurance is in the same direction, that the negligence of subordinates, many of whom must often be employed without much knowledge of them by employers, is one of the perils insured against. In *Chandler v. Worcester Mutual Fire Ins. Co.*, 3 Cush. 328, the rule is laid down thus: "The general rule unquestionably is, in case of insurance against fire, that the carelessness and negligence of the agents and servants of the assured constitutes no defense." The question there was, whether gross negligence on the part of the assured himself, gross carelessness, equivalent in legal estimation to a willful intent to burn the building, would be a good defense. It seems difficult to see how an incorporated company, who must act by agents and servants, could otherwise comply with their representations. If, indeed, such servants and agents are habitually or frequently careless in performing their duties, it may become negligence on the part of the employers, whose duty it is to have a reasonable vigilance over them, and employ faithful servants.

4. The next exception turns on the representation that a water-cask was kept in each room, and the admission of evidence tending to show in what sense the parties understood the word "room." This is a point which seemed most doubtful, and which has had the particular attention of the court.

The question arises upon the representation made in answer to the twenty-fourth interrogatory. It may be remarked in passing that there is some discrepancy between the question and answer. Whether designed or not does not appear. The question is, "Are there casks in each loft constantly supplied with water?" The answer is, "There is in each room casks of forty-two gallons each kept constantly full." If the plaintiffs intended to conform their answer to the question proposed, then it is manifest that in their view the word "loft" in the

question and "room" in the answer would mean the same thing, and the effect of the answer would be that a cask was kept in each loft. This would raise another question, whether the term "loft" would include the basement story, or only the chambers over the basement, the "rooms aloft." Or did it mean each story? These considerations are perhaps not material, except that they have some tendency to show that the word "room" was used without any very precise or definite meaning. The evidence offered for the purpose of falsifying this representation was, that there was in the basement story a partition, setting off a part for a particular purpose, in which no water-cask was kept—that in the next story above there was a small apartment partitioned off, in which there was no water-cask; and in the two stories above, the water-casks stood in the entry-ways by the doors of the main rooms, and not in the main rooms. If the plaintiffs, in answering the interrogatory as put, intended to say that there is a cask of water kept for each loft or each story, the jury might well find that the representation was true; if they intended to use the word "room" in a narrower sense, so as to mean more than one apartment in each loft or story, then it becomes necessary to inquire what was the extent of the word "room" as used in this answer. The word is certainly a familiar one in the English language, and as ordinarily used and construed, as all words must be, by the subject-matter and the context, is not likely to be misunderstood, yet it is not without some considerable varieties of meaning. Apply it to a dwelling-house, and suppose one in offering a house to be sold or let should represent that there is a fireplace in every room. Suppose there is a cellar or an attic, with or without windows: are they rooms? Or suppose a large apartment into which the front door opens, used for the double purpose of an entry and for a sitting-room in warm weather, and furnished for that purpose: is it a room within the representation that there is a fireplace in it? Or suppose above stairs one or more small apartments capable of being used as a closet or clothes-press or for a bedroom: would the representation be falsified by showing that either of these divisions of the house had no fireplace in it? The language might be somewhat ambiguous, and require aid to ascertain its meaning.

The interpretation of written contracts—indeed, of all written documents—is a question of law for the court; and it is of great importance that the meaning of written evidence should not be altered or varied by parol evidence. But this presupposes that

the words are used in their ordinary and normal sense, according to the established rules of the language; but if they are foreign words, or words used in a peculiar, unusual, or technical sense, evidence may be proper to show their meaning, and then it is the province of the court to declare and apply the law according to the true meaning of the language as thus ascertained. The rule is laid down in the case of *Eaton v. Smith*, 20 Pick. 156, thus: "When a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will be to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word modified or explained by the usage."

This principle seems to be intelligible enough, but the difficulty in applying it as a practical rule is this: the words severally and as first read seem plain, but like other matters of latent ambiguity, it is when they come to be applied to the subject-matter that the ambiguity becomes apparent. Then it is that evidence of usage or other evidence *aliunde* becomes competent and admissible to show the sense in which the words were used in the particular written paper. It must depend, therefore, much upon the circumstances of each case, and the posture of the evidence already admitted in the trial, whether such evidence *aliunde* ought to be admitted. In the present case, we are of opinion that there was sufficient uncertainty and ambiguity in the representation in question to warrant the introduction of evidence of usage, and it was a question of fact for the jury to decide whether, according to the true meaning of the language used, the representation was substantially true when made, and substantially complied with afterwards.

One other ground was taken by the defendants in this branch of the case, thus: The defendants contended not only that the meaning of the word "room" in the application was a question of law for the court to decide, and also whether there was such a general use of language, but also that if there were such use of language it was insufficient, unless it was known and general among insurers as well as manufacturers. Such a direction we think would not have been conformable to the rules of law. The general rule on that subject is, that if any person or any company, foreign or domestic, shall engage in any branch or

department of business, they must be presumed to be acquainted with the rules and usages of such business, to be conversant with the language employed in it, whether strictly technical or not. When, therefore, the defendant company undertook to insure a manufactory in Massachusetts, with the machinery and stock therein, they must be presumed to be acquainted with the structure and arrangement of such building and the distribution of the departments within it, with a view to its adaptation to the business to be therein carried on, and with the use of the language employed by the owners, superintendents, and persons employed therein. If, therefore, the language of this representation was understood in a particular manner by manufacturers, according to which understanding the representation was true, the legal presumption is that it was so understood by the insurers in their contract.

5. Exception was taken to the admission of the witness Adams as an expert; but no sufficient ground has been shown that his admission was erroneous; nor does it appear to us that the questions permitted to be put to him and the answers he gave to them, for the limited purpose to which they were confined by the instructions given thereon to the jury, are open to exception.

Exceptions overruled.

CONTRACT OF INSURANCE TO BE INTERPRETED ACCORDING TO LAWS OF STATE WHERE IT IS TO TAKE EFFECT. Thus a policy of insurance signed by the officers of the company in Missouri, but upon condition that it should not be valid unless countersigned by the company's agent in New York, and there delivered to the insured upon payment of the premium, is a contract to be governed by the laws of the latter state: *Todd v. State Ins. Co.*, 11 Phila. 357, following the principal case.

APPLICATIONS, SURVEYS, OR PROPOSALS, WHEN PART OF POLICY SO AS TO MAKE STATEMENTS THEREIN WARRANTIES: See note to *Fowler v. Aetna F. Ins. Co.*, 16 Am. Dec. 465; *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567; *Farmers' Ins. & Loan Co. v. Snyder*, 30 Id. 118; *Wood v. Hartford F. Ins. Co.*, 35 Id. 92; *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 40 Id. 345, and note; *Holmes v. Charlestown M. F. Ins. Co.*, 43 Id. 428; and see *Frost v. Saratoga Mut. Ins. Co.*, 49 Id. 234; *Jones Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.*, 54 Id. 742. Warranties are not to be created nor extended by construction; they must arise, if at all, from the fair interpretation and clear intendment of the words used by the parties: *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 391, citing the principal case; and if by any words of reference the stipulations in another instrument can be construed a warranty, they must be such as make them in legal effect a part of the policy: Id. 392, quoting the principal case.

DISTINCTION BETWEEN EFFECT OF WARRANTIES AND REPRESENTATIONS: See note to *Fowler v. Aetna F. Ins. Co.*, 16 Am. Dec. 463; *Duncan v. Sun F. Ins. Co.*, 22 Id. 539; *Farmers' Ins. & Loan Co. v. Snyder*, 30 Id. 118; *Glen-dale Woolen Co. v. Protection Ins. Co.*, 54 Id. 309.

MISREPRESENTATION DEFINED.—The definition of misrepresentation given by Shaw, C. J., in the principal case, is quoted and approved in *Bridgewater Iron Co. v. Enterprise Ins. Co.*, 134 Mass. 438; *Mutual Benefit Life Ins. Co. v. Robertson*, 59 Ill. 128.

MISREPRESENTATION, WHEN AVOIDS POLICY: See note to *Fowler v. Aetna F. Ins. Co.*, 16 Am. Dec. 432; *Strong v. Man. Ins. Co.*, 20 Id. 507; *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567; *Curell v. Mississippi M. & F. Ins. Co.*, 29 Id. 439; *Aetna F. Ins. Co. v. Tyler*, 30 Id. 90; *Farmers' Ins. & Loan Co. v. Snyder*, Id. 118; *Martin v. Fishing Ins. Co.*, 32 Id. 220; *Bell v. Western Marine & F. Ins. Co.*, 39 Id. 542; *Houghton v. Manufacturers' Mut. F. Ins. Co.*, 41 Id. 489; *Clark v. New England Mut. F. Ins. Co.*, 53 Id. 44. Where in an action on a contract of insurance the defendant contended that the contract was made under a mutual mistake of fact as to whether a previous risk had expired when the new contract was made, it is a question of fact for the jury whether this mutual mistake was a material mistake which would influence the parties in making the contract, and upon this question the burden of proof rests on the defendant: *Dodd v. Gloucester Ins. Co.*, 127 Mass. 152; and in an action on a policy, an instruction asked by the defendant to the effect that "if the plaintiff in any paper offered by him as a proof of loss stated that the property described in the policy in suit belonged exclusively to himself, and that no other person had any interest therein, when in fact he was only a pledgee or mortgagee thereof, and not in possession, such false swearing would avoid the policy," is improper: *Little v. Phoenix Ins. Co.*, 123 Id. 386; both citing the principal case.

CONCEALMENT, WHEN AVOIDS POLICY: See *Burritt v. Saratoga Co. Mut. F. Ins. Co.*, 40 Am. Dec. 345; *Gates v. Madison Co. Mut. F. Ins. Co.*, 55 Id. 360, and notes thereto.

WHAT FACTS ARE MATERIAL: See *Himely v. South Carolina Ins. Co.*, 12 Am. Dec. 623; *Smith v. Columbia Ins. Co.*, 55 Id. 546.

BURDEN OF PROOF IS ON INSURERS to prove falsity of representations set up as a defense to an action on the policy: *Jones Mfg. Co. v. Manufacturers' Mut. F. Ins. Co.*, 54 Am. Dec. 742; or their materiality: *Dodd v. Gloucester Ins. Co.*, 127 Mass. 152; so the burden of proving the breach of an executory stipulation by which a policy was to determine upon the failure of the assured to pay when due a premium note given by him to the insurers, and the avoidance of the policy by such non-payment, is upon the insurers: *Hodsdon v. Guardian Life Ins. Co.*, 97 Id. 148; both citing the principal case.

NEGLIGENCE OF INSURED NO DEFENSE TO ACTION ON POLICY: *Gates v. Madison Co. Mut. Ins. Co.*, 55 Am. Dec. 360, and note.

MISCELLANEOUS CITATIONS OF THE PRINCIPAL CASE.—The rule laid down by Shaw, C. J., in the principal case, to the effect that a person or company engaging in any business must be presumed to be acquainted with the rules and usages of such business, and to be conversant with the language employed in it, whether strictly technical or not, is quoted with approval in *Houghton v. Watertown Ins. Co.*, 131 Mass. 303. In *Palmer v. Clark*, 106 Id. 388, the principal case was cited, in construing a contract, to the effect that the words "each room," used in an application for insurance, might mean each whole story in a mill, although there might be more than one room in each story; in *Poor v. Humboldt Ins. Co.*, 125 Id. 277, it is an authority to the effect that a stipulation that a family should live in the house insured "throughout the year" was an express warranty, and without its literal and exact fulfillment the policy would cease to be binding upon the company; in *Insurance*

Co. of North America v. McDowell, 50 Ill. 131, it is cited to the point that where a policy of insurance on a mill prohibited smoking in or upon the premises under penalty of forfeiture of the policy, the insured undertook only that this violation should not occur with his consent, and that he would use reasonable diligence to prevent it; and in *Peoria Marine & F. Ins. Co. v. Walser*, 22 Ind. 83, it is referred to upon the question of what is a sufficient execution of a policy.

PAYNE v. SNOW.

[12 CUSHING, 443.]

MEMBERS OF LODGE OF ODD FELLOWS ARE NOT LIABLE TO ACTION AT LAW FOR RECOVERY OF FUNERAL BENEFIT by the next of kin of a deceased member, under their constitution and by-laws, which provide that "in case of the death of a brother, * * * there shall be paid to the nearest of kin of such brother a sum of not less than thirty dollars to defray the expense of his burial, which shall be paid over without delay."

CONTRACT to recover a funeral benefit of thirty dollars of the defendants as members of a lodge of the Independent Order of Odd Fellows. The action was brought by the father, as next of kin, of a deceased member of the lodge, and was sought to be maintained under its constitution and by-laws, which provided that "in case of the death of a brother who shall have paid his initiation fee, assessments, fines, and weekly dues, and shall be in good and regular standing, there shall be paid to the nearest of kin of such brother a sum of not less than thirty dollars to defray the expense of his burial, which shall be paid over without delay." The widow of the deceased had been paid twenty dollars of the funeral benefit by one of the defendants, on behalf of the lodge, and on her death shortly afterwards, without issue, the remaining ten dollars were paid to her mother. It was considered by the lodge and the parties acting at the time that the thirty dollars were paid to the widow according to the provision of the constitution and by-laws, and in accordance with the usage of the order and the custom of the lodge. By the authoritative construction of the grand lodge and its officers, and by the usage and custom of the order, the term "nearest of kin," as used in the clause above given, was understood to mean the widow of any deceased brother, when the deceased left a widow; and it was the usage and custom to pay the funeral benefit to such widow. If under the foregoing agreed statement of facts the plaintiff can maintain this action, he is to be allowed to summon the parties named in the answer as members, without prejudice through delay, and to have judg-

ment against them for such sums as the court shall determine; but if the action can not be sustained on the facts, judgment is to be given for the defendants.

N. C. Berry, for the plaintiff.

A. B. Ely, for the defendants.

By Court, SHAW, C. J. This is certainly a case of entirely new impression, and it is one grave objection to the plaintiff's recovery that no similar action has ever been sustained in this commonwealth. It is a suit against ten or twelve persons; and it is conceded that if they are liable, forty or fifty more are jointly liable with them, composing a lodge of the Independent Order of Odd Fellows. So many considerations seem to be opened by the discussion that we have neither time nor disposition to go at large into the details. It is conceded that the lodge is a voluntary association, not incorporated, and that if liable at all, the members of it are liable in their individual capacities, as joint promisors. But this lodge itself, this aggregation of individuals, is but the component part of another aggregation of individuals denominated the "grand lodge," to whom, by the same voluntary agreement, the whole of the funds of the particular and subordinate lodge may at any moment, upon various contingencies, be forfeited and appropriated.

But supposing the particular lodge stood alone, still the difficulty presents itself of a suit for thirty dollars, upon the joint promise of say sixty persons, constituting a voluntary association of individuals, perpetually changing by the retirement of members and the admission of others. Shall the same sixty individuals who constituted the lodge when the implied promise took effect be sued, though they have ceased to be members? If not, how can the residue be held upon a joint promise? Or, shall those be sued who were not members when the implied promise took effect but who have become such when the action is brought? If so, what joint promise of those who have since come in can be proved by the evidence?

But without encountering these difficulties, we think there are two plain legal grounds upon which it must be held that this action can not be maintained.

1. The constitution and by-laws of the lodge, treating them as articles of a voluntary association, do not amount to a promise to each member by all the rest to pay him anything. The stipulation in the by-laws is, that on the death of each member there shall be allowed from the lodge a sum not less than thirty

dollars to defray the expense of burial, to be paid without delay to the deceased's nearest of kin. The payment is for that purpose. It is, if any promise at all, a promise by each member to contribute, by periodical and other payments, towards a certain fund for all the purposes contemplated by the association, including money to be paid promptly for the expenses of burial, to be done usually before letters testamentary in case of a will, or letters of administration in case of intestacy, can be regularly issued. In other words, the promise of each member is to pay money to the lodge; and the lodge, not being incorporated, can maintain no suit. If it creates any right which can be recognized by law, it is an equitable right only to a share in a common fund, raised either for purposes purely charitable, or for their joint benefit, and can only be enforced in equity. And if there were any ground for such equitable relief, as in case of partners in a joint fund, raised for a special purpose, of which we give no intimation, such equitable relief could be sought only by a member or his legal representative.

2. But supposing this stipulation in the constitution and by-laws of the lodge to amount to an express promise to pay thirty dollars upon a certain contingency, there is no consideration for such promise moving from the plaintiff to the defendants, or from any person acting in privity with him or acting for his use or benefit, or with an intent and purpose to obtain a benefit to the plaintiff. There is no ground to infer, from the facts agreed, that the son, who was a member of the lodge, in paying his contributions thereto had any purpose of obtaining money from the lodge, in case of his death, for the use of his father, or other next of kin, for his own benefit; to whomsoever it might be paid, under these provisions, it was a naked trust for defraying the charges of his burial. It is, therefore, not at all analogous to the case where A. owes B. and B. owes C., and in consideration that B. will release A. he promises to pay C. Such promise is valid, and C. may sue A. upon it. The reason is, that although the consideration for A.'s promise to C. does not move from C., it moves from A. for C.'s use and benefit.

Where a father, desirous of making a provision for his daughter, conveys property to A. B., in consideration of which A. B. promises to give a certain sum to the daughter, she has a right of action, because the consideration moved from one acting for her use and benefit. The cases, therefore, of *Hall v. Marston*, 17 Mass. 575, *Carnegie v. Morrison*, 2 Met. 381, and others of that class are not applicable.

Without considering various other questions suggested by the case, the court are of opinion that upon the facts agreed this action can not be maintained.

Plaintiff nonsuit.

LIABILITY OF MEMBERS OF FRATERNITIES: See Hirschl on Fraternities and Societies, sec. 6, where the principal case is cited.

FUNDS OF MASONIC LODGE, WHETHER CAN BE DIVIDED AMONG MEMBERS, See *Duke v. Fuller*, 32 Am. Dec. 392.

DEXTER v. SNOW.

[12 CUSHING, 594.]

CONTRACT IS VOID AS IN CONTRAVENTION OF INSOLVENT LAWS, by which debtors agree to pay certain creditors a portion of their claim, in consideration that the creditors would not trouble or oppose the debtors' discharge in their insolvency proceedings, and would say a good word to other creditors to induce them not to oppose a discharge.

ASSUMPSIT upon the following agreement: "We, the undersigned, the late firm of Snow, Durant & Jenkins, severally agree to make up to our creditors, Dexter, Harrington & Co., the deficit of assets in the hands of T. C. Kendall, assignee, so that they shall receive thirty-seven and one half cents per cent on their claim of one thousand one hundred and thirty-three dollars against us." The agreed statement of facts admitted that the consideration of this agreement was the plaintiffs' undertaking "not to trouble or oppose the defendants obtaining a discharge in their insolvency proceedings, and to say a good word to other creditors to induce them not to oppose a discharge." No such an agreement was made with or known to any of the defendants' other creditors, with the exception of two, who did not with the plaintiffs constitute a majority of the creditors in number or value; and it was not contended that the defendants had failed to conform in any respect with the insolvent law. The defendants had obtained their discharge.

S. E. Guild and G. S. Hale, for the plaintiffs.

R. F. Fuller, for the defendants.

By Court, SHAW, C. J. The agreement on which this action is founded contravenes the policy of the insolvent laws. The insolvent laws have a twofold object: 1. To secure a full and equal distribution of the debtor's effects among the creditors; and 2. To discharge the honest debtor from all his

liabilities. Agreements like the one in suit offer to the debtor a temptation to set apart and withhold a portion of the funds for the purpose of purchasing the assent of creditors to his discharge. Again, such agreements tend to prevent that scrutiny on the part of the creditors of the acts of the debtor, which is requisite to secure a full disclosure and equal distribution of the insolvent's effects. Besides, the mere inaction of one creditor tends to influence the conduct of the others. Frequently great confidence is put in the judgment of one creditor; and others, not knowing that his interests are not identical with their own, are led to follow his example. If he makes no investigation into the affairs of the insolvent, they suppose it is because he has confidence that the conduct of the debtor is beyond exception; and if the creditor does not oppose the discharge, it is inferred that he considers the debtor a person fairly entitled to it. Frequently the course of one creditor will determine the course of all the rest.

It is to be observed in the next place that the policy of the insolvent law is to discharge the debtor who complies with all its requisitions. The creditors have the power to prevent the discharge by their dissent; but they are morally bound not to oppose it where the insolvent has complied with all the requirements of the insolvent law. The law, in clothing the creditors with this power, places a confidence in them that they will execute the power in such manner as to discharge an honest debtor. If, then, in this case, the debtors have fully complied with the law according to the facts agreed, the plaintiffs were morally bound to do what, in consideration of the agreement in suit, they undertook to do, namely, not to oppose the discharge. In such case the undertaking to do what they were morally bound to do, independently of the promise, would be no consideration, and the agreement in suit would be a nude pact.

But it is not merely *nudum pactum*, a promise without consideration; but its direct design is to promote an unlawful purpose. In the language of a late decision of this court, it was tainted with illegality: *Downs v. Lewis*, 11 Cush. 76. In case of debtors who have not complied with the requirements of law, the law intends that they shall not be discharged; and agreements securing their discharge notwithstanding are against the policy of the law. On both grounds, therefore, the contract is void.

Judgment for the defendants.

AGREEMENT IS VOID UNDER INSOLVENT LAWS by which the debtor agrees to pay to certain creditors certain sums of money, or to pay their claims in full in consideration that they will not oppose his discharge: *Sharp v. Trese*, 17 Am. Dec. 479; *Rice v. Maxwell*, 53 Id. 85; and see *Yeomans v. Chatterton*, 6 Id. 277. The principal case was cited to this proposition in *Blusdel v. Fowle*, 120 Mass. 448; *Sanford v. Huxford*, 32 Mich. 322.

THE PRINCIPAL CASE WAS ALSO REFERRED TO in *Maguire v. Smock*, 42 Ind. 5, as bearing on the question that any agreement or combination among parties petitioning for the improvement of a street, by which a few individuals, desirous of causing the improvement to be made, procure the signatures of others to the petition by paying or agreeing to pay a consideration therefor, either directly or indirectly, was a fraud on the law and contrary to public policy.

CASES
IN THE
SUPREME COURT

MICHIGAN.

MOORE v. SANBORNE.

[2 MICHIGAN, 519.]

DOCTRINE OF ENGLISH COMMON LAW IN RELATION TO NAVIGABLE WATERS can aid our American courts very little in the consideration of this question, as we have no navigable streams within the common-law signification of that term. Nor can the common-law doctrine as to rivers not navigable, yet public highways from their adaptation to public use, be fully and liberally adopted by us.

AT COMMON LAW THOSE RIVERS ONLY ARE SUBJECT TO SERVITUDES OF PUBLIC INTERESTS which are of common or public use for carriage of boats and lighters and for transportation of property, and which were susceptible of use by the public generally for navigation. Their adaptation to a particular use by individuals in the course of their trade, but not to general use, would not constitute them public highways.

IN UNITED STATES, PUBLIC RIGHT TO USE OF RIVERS FOR TRANSPORTATION PURPOSES does not depend upon custom or general use, but this right exists upon all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use or the extent of such use.

FACT THAT FLOATABLE STREAM HAS NOT BEEN USED BY PUBLIC, or has been used only by persons following a particular occupation, can not deprive it of its public character. In the new states of the Union, from necessity and the very nature of things, usage and custom can not be the foundation of the public right.

EASEMENT EXISTS IN FAVOR OF PUBLIC UPON FRESH-WATER RIVER OR STREAM, if such stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs. This leaves to the owners of the beds of such streams all modes of use not inconsistent with said easement.

CAPACITY OF STREAM TO FLOAT BOATS IS NO CRITERION of the existence of a public easement upon it for the purposes of transportation. The

servitude of the public depends rather upon the purpose for which the public requires the use of its streams than upon any particular mode of use; hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacture or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient.

EASEMENT OF PUBLIC FOR TRANSPORTATION PURPOSES over a stream is not destroyed because such stream can not be used for that purpose at an ordinary stage of the water at all seasons of the year. It is a capacity to meet the public necessity which furnishes the true test. It is a valuable rather than a continual use which determines the public right.

PERSON EMPLOYED TO CUT LOGS OFF OF CERTAIN PREMISES BELONGING TO HIS EMPLOYER, and who agrees to deliver them to his said employer at a certain place, is alone responsible for any damage caused by floating said logs down to said point of delivery, as the relation of master and servant does not exist between them.

EMPLOYER, WHEN RESPONSIBLE FOR ACT OF EMPLOYEE.—An injury must arise in course of the execution of some service, lawful in itself but negligently or unskillfully performed, in order to render the employer liable for the act of his employee; as for a wanton violation of law by a servant, although occupied about the business of his employer, the servant alone is liable.

ERROR to St. Clair circuit. The facts are stated in the opinion.

R. P. Eldredge, for the plaintiff in error.

J. V. N. Lothrop, for the defendants in error.

By Court, **MARTIN, J.** This was action on the case, to recover damages for an alleged obstruction of Pine river, claimed to be a public highway. From the case presented, we gather that Pine river is a small stream emptying into the St. Clair. That from its mouth to a place called the "deer licks," a distance of about six miles, it is navigable at all seasons for boats, rafts, logs, etc., while above the "deer licks," and to a point above where the parties used the same, the river was only capable of being used for floatage during the periodical freshets, or at least "not at ordinary times in summer;" and that the usual length of the freshets is from two to three weeks. It appears, also, that the river has been used for running logs and lumber for some fifteen or sixteen years; and from the "deer licks" down, over twenty years.

The purpose for which it is alleged the parties to this suit were occupying the river at the time of the injury complained of, was floating logs from points above the "deer licks" (but how far the case does not disclose) to its mouth, and it appears that

other individuals had at the same time logs in the river, floating upon the current and driven in connection with those in question, and that the logs of all combined, amounting to some ten or fifteen thousand, formed the jams which occasioned the delay and injury complained of.

Among the several questions presented by the bill of exceptions, two of considerable interest are embraced. The first is, Is Pine river a public highway?

Upon the trial below, as appears from the bill of exceptions, the court charged the jury that "if they should find Pine river to have been used as a highway for the purpose of floating mill logs, even though at times, at low water, it was not so capable of floating them, they would find it a public highway, to the use of which the public had a right;" and from the charge, which is made a part of the bill, it appears that the court also instructed the jury as follows: "It is asserted, and I have no doubt with truth, that this suit is not brought principally to recover dollars and cents, but to obtain a judicial settlement of the important questions to which I have alluded. Now, for the purpose of presenting and having determined the whole question, as to how far the public have a right to use our inland rivers, and for the government of your action, I shall rule that Pine river, up to that point where you may find that the parties cut and put into it, and from which point logs are run to market or to the mouth of the river, is a public highway on which the whole public have an easement; that although the soil over which the river runs may be owned by the adjacent proprietors, the riparian owners, the public have a right to the use of the river in floating to a market logs, rafts, etc., found or produced upon its banks." It further appears that the court refused the request of the plaintiff in error to charge "that if the jury should find that Pine river and its branches above the point on the river known as the 'deer licks' are not of sufficient depth to float mill logs in an ordinary stage of the water, that said river and its branches above said point is not a public highway or navigable stream;" and also refused the further request to charge that if they "should find that Pine river above the 'deer licks' is not of sufficient depth to float logs in an ordinary stage of water, and has not been used for floating logs for a period of twenty years or upwards, it is not a public highway, and defendant is not liable in this action."

As the river in question is a small stream, and but of limited capacity for floatage, the question is fairly and distinctly presented as to what streams are to be regarded as public high-

ways in this state, so as to be under the servitude of the public interests.

The doctrine of the English common law in relation to navigable waters can aid us very little in the consideration of this question, as we have no navigable streams within the common-law signification of that term. Nor can its doctrine as to rivers not navigable, yet public highways from their adaptation to public use, be fully and literally adopted by us. The length and magnitude of many of our rivers, the occasions and necessities for their use, and the nature and character of our internal commerce, all require a liberal adaptation of those doctrines to our circumstances and wants, and to a condition of things, both as to capability of our streams for public use and the occasions for such use, entirely different from and in many respects altogether new to those which concurred to establish the common-law rule; and we accordingly find that in all the states that rule has been enlarged so as to meet the condition and wants of the public, and the necessities of trade and commerce: See Angell on Watercourses, secs. 546, 550, and cases cited; *Spooner v. McConnell*, 1 McLean, 350; *Bowman v. Wathen*, 2 Id. 376; *Shaw v. Crawford*, 10 Johns. 237; *Wadsworth v. Smith*, 11 Me. 278 [26 Am. Dec. 525]; *Scott v. Willson*, 3 N. H. 321; *Brown v. Chadbourne*, 31 Me. 9 [50 Am. Dec. 641].

Most of the cases which are to be found in the books involve the rights of riparian owners, and concern private interests, as fisheries, etc.; and I have been unable to find any case where the distinct question of the right to a passage along a river has been raised and litigated between individuals claiming no riparian right, and depending alone upon the public easement, as is the present. Hence the danger of adhering too closely to the authority of those cases, or of attempting to deduce from them a rule which shall determine the question here raised—for not unfrequently the rights of the public are loosely or only incidentally mentioned, and generally those of the litigants are determined by altogether different rules, and upon altogether different principles from those of persons claiming only a right of passage as between themselves.

Yet even in those cases where the rights of riparian owners have been litigated, it will be found that the right of the public to a common passage has been liberally supported and applied: See cases above cited; also *Hogg v. Zanesville Can. & Man. Co.*, 5 Ohio, 410; *People v. Platt*, 17 Johns. 195 [8 Am. Dec. 382].

Strictly, at the common law, those rivers only are subject to

the servitude of the public interests which are of common or public use for carriage of boats and lighters, and for transportation of property. "There be some streams or rivers," says Lord Hale, in his treatise *De Jure*, etc., "that are private, not only in propriety or ownership, but also in use, as little streams or rivers that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters—and these whether they are fresh or salt—whether they flow and reflow or not, are *prima facie*, *publici juris*, common highways for man or goods, or both, from one inland town to another." Like every other rule of the common law, this sprung from usage and immemorial custom; and giving to it its broadest signification, it could only have had application to those rivers which were susceptible of use by the public generally for navigation, and their adaptation to a particular use by individuals in the course of their trade, but not to general use, would not constitute them public highways. But in this country the public right can not depend upon custom or upon general use; and we accordingly find in nearly all the states this rule has been extended so as to be adapted to the necessities of our trade and commerce, and to embrace all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use, or the extent of such use. A stream which can only be made floatable by artificial means can in no sense be deemed a public highway; nor, on the other hand, can the fact that a floatable stream has not been used by the public, or has only been used by persons following a particular occupation, deprive such stream of its public character. This principle is one of vast importance to the interests of this and all new states. We have a large territory yet undeveloped, rich in forest and in mineral wealth—washed by vast bodies of water upon three sides, and threaded by innumerable streams which are capable of navigation, many of which are, and many others of which may be, made serviceable in developing its resources—and with a commerce already established, rivaling in extent that of some of the Atlantic states, and rapidly growing under the influence of increasing population, settlements, and wealth, it is of the first importance that the rights of the public be recognized to the free use of all streams susceptible of any valuable floatage. In this commerce our lumbering interests sustain, and will continue to sustain, an important part, and their success depends to a vast if not entire extent upon this principle. Indeed, a

moment's reflection will convince us that a liberal application and retention of the common-law rule, and its adaptation to our condition and wants, lies at the bottom of this branch of our trade. Although in some of the states usage and custom have been regarded as the foundation of this public right in fresh rivers, yet in others the application of this doctrine has been denied. In the new states, from necessity and the very nature of things, such can not be the foundation of the public right.

In *Brown v. Chadbourne*, 31 Me. 9 [50 Am. Dec. 641], the court; after an examination of the authorities, nearly every one of which was cited by counsel in the argument of this cause, deny the application of the doctrine of prescription to this class of cases. "If," say the court, "a stream could be subject to public servitude by long use only, many large rivers in newly settled states, and some in the interior of this state, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases is, whether a stream is inherently and in its nature capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs. Where a stream possesses such a character, then the easement exists, leaving to the owners of the bed all other modes of use not inconsistent with it."

The ordinance of 1787 would supersede this doctrine of the necessity of usage or custom to establish a public right over our rivers, even were such the established rule of the common law. It declares that the navigable waters flowing into the Mississippi and St. Lawrence shall be common highways and forever free. It was framed without regard to the common-law rule as to what constituted navigable waters, and was designed to extend over all streams which were capable of being used for any purposes of public utility. This ordinance, it will be remembered, was established long before any considerable settlement of the territory over which its provisions were to extend, and it was intended to provide for future contingencies, rather than for immediate application—was, in fact, the declaration of a perpetual reservation of rights to the public, subordinate to which individual rights should be acquired. Hence, of necessity, it must supersede such doctrine of user, if indeed it were ever applicable to such cases, for it was designed to extend over streams and waters then lying in the unbroken wilderness, un-

navigated except by the Indian's canoe; and as that wilderness should be opened and settled, and its streams be required for commercial use, the public right attached immediately, and of necessity.

It was contended in argument, in behalf of the plaintiff in error, that the capacity of a stream to float logs and rafts was no criterion of the public right of servitude; but that to render a river a public highway, it must be susceptible of navigation by boats. But this, we apprehend, is too narrow a rule upon which, in this country, to establish the rights of the public, and as already intimated, such is not the rule in any of the states. The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams than upon any particular mode of use; and hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacturing or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient. In one instance, perhaps, boats can only be used profitably from the nature of the product to be transported; whilst in another they would be utterly useless. Upon many of our streams, although of sufficient capacity for navigation by boats, they are never seen; whilst rafts of lumber of immense value, and mill logs which are counted by thousands, are annually floated along them to market. Accordingly, we find that a capacity to float rafts and logs in those states where the manufacture of lumber is prosecuted as a branch of trade is recognized as a criterion of the public right of passage and of use, upon the principle already adverted to, that such right is to be ascertained from the public necessity and occasion for such use. See *Scott v. Willson*, 3 N. H. 321; *Wadsworth v. Smith*, 19 Me. 278 [26 Am. Dec. 525]; *Brown v. Chadbourne*, 31 Id. 9 [50 Am. Dec. 641]. The case of *Munson v. Hungerford*, 6 Barb. 268, does not negative this idea, nor does it furnish any principle for our guidance; for the facts upon which it depended repelled the presumption that the public could have had any valuable right of passage or floatage upon Black river, by reason of its rapid and broken current. In *Wadsworth v. Smith*, *supra*, it was expressly held that if a stream be naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose.

But it is urged that, conceding such to be the rule, if a stream be not capable of being used to float mill logs in an ordinary stage of water, it is not subject to the servitude of the public

interests. But we have already attempted to show that a capacity for use to meet the public necessities furnishes the true test in such cases. It is a valuable rather than a continual use which determines the public right. Any other rule, as remarked by counsel upon the argument, would deprive many of our large rivers of their public character. "The law nowhere defines the character of a stream by admeasurement of its volume." An ordinary stage can not be construed as meaning a continual stage nor an average stage. Such stage, common experience teaches us, varies with the seasons. An ordinary stage in the summer months is very different from an ordinary stage in the spring and autumn months. The term has relation rather to the susceptibility of a stream for use, in a natural condition, without the application of artificial means, as dams for the purpose of flooding, than to a continuous capacity for floatage, and is used in contradistinction from an extraordinary and unnatural stage. That which occurs periodically can hardly be said to be unusual, much less extraordinary. But the case of *Brown v. Chadbourne, supra*, is so directly apposite to the case at bar, and establishes principles so perfectly adapted to our condition and interests, that it appears almost unnecessary to do more than to refer to and adopt it, as meeting with our entire approval.

That was an action in case for maintaining a dam across Little river, and thereby obstructing plaintiff's logs. That was a freshwater river three miles long, flowing from Boyden's lake to tide-water. Its width varied from seven or eight feet to three or four rods. The defendant owned lands on both sides of this river, at the point where the dam was built and the obstruction was occasioned. Upon the trial many of the questions which are found in this case arose, and the court was requested to charge the jury, amongst other things, that "to constitute Little river a navigable or floatable stream, it must be shown to be capable, in its ordinary and natural state, of floating logs, boats, and rafts—and it is not enough to prove that logs may be carried down at certain seasons of the year, when the stream is raised by a freshet," which was refused; and the court held that it was not necessary, in order to determine a stream a public highway, that it should have a capacity for floatage, in its natural and ordinary stage at all seasons of the year, and that none of the authorities required this test. "A distinguishing criterion," says the court, "consists in its fitness to answer the wants of those whose business requires its use. Its perfect

adaptation to such use may not exist at all times, although the right to it may continue to be exercised whenever an opportunity occurs." And in further discussion of this question, the court further says: "Most of the great rivers of this state in some portions of their passage are so much impeded by rocks, falls, or other obstructions that logs can not be floated in them any great distance at what may be called an ordinary state of the water. They generally remain in this condition a sufficient length of time to answer the purposes of a common highway, and their fitness and character as such can not be destroyed because they can not be used in their ordinary state. A test so rigid and severe as that required by the instruction requested would annihilate the public character of all our fresh-water rivers for many miles in their course from their sources toward the ocean. The timber floated upon our waters to market is of great value, and neither the law nor public policy requires the adoption of a rule which would so greatly limit their use for that purpose." It may be difficult in some cases to draw the line between public and private streams. This must be determined by the jury from the facts presented in the case, and the rules of law as applicable to such facts.

The next question which arises in this case is, whether the plaintiff in error was liable in any event to the defendants in this action. It appears that one Stewart was the person employed in getting out and running the logs in question. Upon the trial he was produced as a witness in behalf of the plaintiff in error, who offered to prove by him, in defense of the action, "that the plaintiff in error made a bargain with him, Stewart, previous to 1850, to cut all the logs that such plaintiff in error had upon a certain quarter-section of land—north-east quarter of section 7, township 6 north, range 16 east, in St. Clair county—and deliver them to the said plaintiff in error at the mouth of Pine river, in the village of St. Clair, at twelve shillings per thousand feet, and that the logs spoken of by defendants in error's witnesses, as marked 'R. M.,' were cut under that contract;" and further, to show that at the time he cut and run the logs in question he was not the servant or agent of the plaintiff in error, and that plaintiff had no interest in the running of the logs until they reached the mouth of Pine river, nor was he to render any assistance, pecuniary or otherwise, in the cutting or running of said logs. This proposition was made in several forms and objected to by the defendants in error, and the testimony excluded. But it appears from the minutes of the trial

that the court did offer to permit the plaintiff in error to show that the logs cut and marked "R. M." were not cut for him, and that he had no interest in them until they reached the mouth of Pine river.

The much vexed and yet unsettled question of the application of the maxim *respondeat superior* is here raised. Perhaps no fixed rule can be established respecting its application, for it must always depend more or less upon the character of the employment and the nature of the contract which may be under consideration, and which will be as various as the occasions which give rise to them. From a careful examination of all the cases which have been brought to my notice, I think it may be safely said that the doctrine of *respondeat superior* applies to all cases—1. Where the relation of master and servant in its most familiar signification exists; 2. Where the superior is in possession of fixed property (as real estate) upon which some service is to be performed; for in such cases the use of the property is confined by law to himself, and he should take care that that use and management works no injury to others, and of consequence, that he brings no persons there who do any mischief to others; and 3. Where, although a special contract be entered into respecting personal property or services which does not create the relation of master and servant as more familiarly understood, yet the principal retains a supervisory power over the execution of the contract, and the actual or constructive possession of the property remains in him: and that it does not apply to those cases where—1. Property is intrusted to the care and management of those who are not the servants of the owner, but who exercise employments on their own account with respect to the care and management of the goods and property of any person who may choose to intrust them to them, to be dealt with according to that employment; 2. Where a contract is made with another in respect of services upon property, when no power of direction or supervision is reserved by the principal, but the entire discretion as to the mode of execution of the contract, together with control of the property, is confided to the employee; 3. In case of a like contract, the contract prescribing the mode of its execution, when possession of the property is surrendered to the employee to enable him to execute such contract; 4. Where the relation of principal contractor and subcontractor exists in relation to works of public improvement, conducted under a public grant, where, from considerations of public policy and the very nature of the employ-

ment, each subcontractor is regarded as a principal, pursuing an independent calling, and responsible for the acts of those in his immediate employment.

The injury complained of in the present case was in the nature of a nuisance, and was not the necessary consequence of Stewart's employment. To render the doctrine of *respondeat superior* applicable, the injury must arise in course of the execution of some service lawful in itself, but negligently or unskillfully performed; for a wanton violation of law by a servant, although occupied about the business of his employer, such servant is alone answerable. The general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do, seems to be too large. His liability depends upon the nature of the employment, the occupation of the person employed, and the control or authority of the employer over the person employed, as well as over the manner of the execution of the employment, and also upon the occasion and nature of the injury.

In examining this question, the testimony offered to be given through the witness Stewart must be regarded as having been given, and as fully establishing the facts which it was offered to prove; for it was clearly competent for the plaintiff in error to show, if within his power, the contract under which the logs were cut and run, as well as the conduct of Stewart in performing that contract, and his control over the mode of its execution, in order that the jury might determine the question of his liability.

This testimony would have established the fact that the logs in question were in the possession of Stewart, under a contract where no power of direction or supervision was reserved by Moore; but the entire discretion as to time and manner of execution was confided to Stewart, and that the whole risk and expense of executing it rested upon him. Under such circumstances it can not be contended that he would not be answerable to Moore for any breach of such contract, or for any loss which Moore should sustain by his negligent execution of it. The relation of master and servant, or of principal and subordinate, did not exist between them; the facts are inconsistent with it, and Stewart could alone be held liable for any injury which he occasioned to the plaintiff by his conduct in running the logs.

The consideration of these questions renders a further review of the case unnecessary.

The judgment of the court below must be reversed, and a new trial granted.

WATERS ARE TO BE DEEMED NAVIGABLE which are sufficient in fact to afford a common passage for all people in sea-vessels: *Collins v. Benbury*, 38 Am. Dec. 722, and note. See also *Martin v. Bliss*, 32 Id. 52; *Bird v. Smith*, 34 Id. 483, and note; *Susquehanna Canal Co. v. Wright*, 24 Id. 312. "It is now fully established in this country, overruling the earlier decisions, that the public have a right of passage over all fresh-water streams which are by nature susceptible of general use, and that those rivers are public and navigable in law which are navigable in fact:" Gould on Waters, sec. 115, citing the principal case, with many others. The principal case is also cited by Gould, sec. 108, where the author says: "It is not necessary that the stream in order to be a highway should be capable of floating logs at all seasons of the year, but its public character depends upon its fitness to answer the wants of those whose business requires its use."

THE PRINCIPAL CASE IS CITED in *Ames v. Port Huron Log D. & B. Co.*, 11 Mich. 145, where the court say that there is a common right of floatage in all streams susceptible of valuable use for lumbering. It is also cited in *Thunder Bay River Booming Co. v. Speechly*, 31 Id. 336, where the court decide that a stream which in its natural condition is capable of being used for important purposes of navigation must be regarded as a public highway, and if the stream is only navigable at certain seasons of the year, during periodical high stages of the water, it is to be considered a public highway at those seasons. But a stream is not a public highway at those times when in its natural condition it can not be used as such, nor has an upper riparian proprietor a right to make it such by detaining the water until a flood can be caused sufficient for floating logs, to the prejudice of a proprietor below.

SUPERIOR IS LIABLE FOR DAMAGE RESULTING FROM AGENT'S WANT OF SKILL and due caution, but not for the willful act of his agent: *Meares v. Commissioners of Wilmington*, 49 Am. Dec. 412, and note. See also note to *Stone v. Cheshire R. R. Corporation*, 51 Id. 192. The principal case is cited to the above point in *City of Detroit v. Corey*, 9 Mich. 165-191; and *Gardner v. Smith*, 7 Id. 410-422.

WHITWELL & HOOVER v. EMORY.

[3 MICHIGAN, 84.]

IT IS NO OBJECTION TO INTRODUCTION IN EVIDENCE OF RECORD OF DEED that the name of one of the subscribing witnesses could not be read without explanatory evidence. and appeared to be a fac-simile of the name on the original deed.

JUDGMENT DEFINED.

ORDER FOR JUDGMENT IS NOT JUDGMENT, NOR DOES ENTRY of such order partake of the nature and qualities of a judgment, as a judgment must clearly ascertain not only the determination of the court upon the subject submitted, but the parties in favor of and against whom it operates.

AFTER EXPIRATION OF TERM, COURT MAY AMEND CLERICAL ERRORS; but anything which enters into the consideration of the court and constitutes part of the judgment can not be changed after the term.

WHERE COURT HAS POWER TO AMEND, all the parties to be affected by such amendment should be cited before the court.

EJECTMENT. Plaintiffs, to support their title, introduced in evidence exemplifications of patents granting the land to Reuben Abbott; the record of a deed from Reuben Abbott and wife to Samuel W. Abbott; the record of a deed from Samuel W. Abbott and wife to Martha Matthews; and the record of a deed from Martha and Sheldon Matthews to plaintiffs. Defendant objected to the introduction in evidence of the record of the deed from Samuel W. Abbott and wife to Martha Matthews, upon the ground that the name of one of the subscribing witnesses could not be read without explanatory evidence, and appeared to be a fac-simile of the name on the original deed. Defendant based his claim to title upon a judgment recovered against Reuben Abbott, execution issued thereon, and proceedings thereunder. The original journal entry of this judgment was as follows: "December 6, 1841. Reuben Emory and Harriett Emory v. Reuben Abbott. On hearing counsel in this cause, on motion of George Woodruff, plaintiffs' attorney, judgment for plaintiffs on demurrer, and that it be referred to the clerk to compute the amount due on the bond mentioned in the plaintiffs' declaration, and the clerk having computed the amount due on said bond at eight hundred dollars, the penalty thereof to be discharged on the payment of six hundred and twenty-four dollars and eleven cents, and costs to be taxed " The above entry, as made upon the journal, remained unchanged and unamended until the commencement of this suit, when, on June 19, 1851, the day of trial, upon the *ex parte* application of defendant, it was amended by inserting between the words "at" and "eight hundred dollars" the following: "Six hundred and twenty-four dollars and eleven cents, ordered final judgment for." This entry was received in evidence, subject to plaintiffs' objection.

O. Hawkins, for the plaintiffs.

G. Woodruff, for the defendant.

By Court, MARTIN, J. We can not perceive the force of the objection to the admission of the record of the deed from Samuel W. Abbott and Martha, his wife, to Martha Matthews, that the surname of one of the subscribing witnesses was apparently a fac-simile of the original, and could not be read without explanatory evidence. Nor can we conceive what explanatory evidence could be offered to decipher this writing. The case informs us that the record of the surname of one of the witnesses was so written as not to be intelligible, and was appar-

ently a fac-simile of the original upon the deed. Parties who procure the record of deeds can not be held responsible for the capacity of the register to read and write. The same reasons which would debar the plaintiffs of this evidence would operate to invalidate the record, and of consequence the grant in case of a subsequent purchase. To so illiberal a rule we can not subscribe. The grantor has discharged his duty by procuring the record of the deed, and the register had done all his by recording it. It was no lack of duty on his part, which is the ground of this objection, but a too literal observance of it. Were the deed in its body so unintelligible as to convey to the register no information of its contents, a record which would be equally unintelligible, or a fac-simile, would hardly be considered as a compliance with the law so as to affect the rights of others. But not so in the case of a single word, which could have thrown no obscurity over the nature and extent of the conveyance, or the description of the property conveyed, so as to mislead a person investigating the title.

The evidence offered by the plaintiffs was properly admitted.

To the admission of the journal entry of December 6, 1841, and the amendment made June 19, 1851, the plaintiffs' counsel objected, for reasons appearing in the statement of the case, but the same was received in evidence, subject to the objection.

Before this amendment was made there was clearly no final judgment entered in the cause. The entry showed nothing but the fact of interlocutory judgment, the order of reference to the clerk, and his action. It is true that it bears upon its face evidence of an omission of something, but what was omitted could only have been inferentially determined. From the subsequent action of the court, it would seem that the omission was thought to embrace the assessment of the amount due upon the bond, and that which it was conceived went to constitute a judgment, viz., the words "ordered final judgment for," and without which there was no evidence of an adjudication by the court.

A judgment is the final consideration and determination of a court of competent jurisdiction upon the matters submitted to it, and it is only evinced by a record, or that which is by law—as the files and journal entries of this state—substituted in its stead. An order for a judgment is not the judgment, nor does the entry of such order partake of the nature and qualities of a judgment record. This must clearly ascertain not only the determination of the court upon the subject submitted, but the parties in favor of and against whom it operates. Such is held to be the rule

even in cases of judgments in justices' courts, and certainly it may not be relaxed in courts of record. A reference to the conclusion of a judgment record will clearly indicate what we mean, and our practice, which authorizes the files and journal entries to be used in place of a record, does not dispense with any of the essential requisites and evidences of a judgment. Hence the almost uniform practice has been to require the journal entries of proceedings had subsequent to the joinder of issue to be as full as the *postea* of a judgment record, and as a matter of fact, to a very great extent the language itself has been adopted. The entry with the amendment, then, comes far short of evidence of a judgment, but is rather in the form and nature of an interlocutory order, or a common rule which by some accident had found its way into the journal of the court.

But the amendment was void, because without the jurisdiction of the court. At the common law, while the proceedings are in paper, an amendment can be allowed, or a judgment could be set aside before the adjournment of the term at which it was rendered; but at a subsequent term the court had no power to change the record of a previous term. By various statutes, both in England and this country, power is given to courts to amend in many cases which they could not exercise at common law. Under our statute, a court may at any time amend clerical errors, but that which enters into the consideration of the court and constitutes a part of the judgment can not be changed after the term: See *Brush v. Robbins*, 3 McLean, 486. Much less has a court power under the form of an amendment to render a judgment.

Before the error in this cause could have been corrected, were it susceptible of correction by amendment, we apprehend that it was necessary that the parties to be affected by it should have been cited before the court. Especially should this be done where the matter had slept ten years. To permit any other cause might work irreparable mischief to parties wholly unconscious of their situation, and jeopard rights fairly and honestly acquired. Such practice is in accordance with all the analogies of the law, and we can see no good reason why it should not be pursued.

Before a judgment could be perfected in the cause, it was certainly necessary that such course should be pursued, and the parties had afforded to them an opportunity to be heard.

Certified accordingly.

JUDGMENT CAN NOT BE AMENDED OR SET ASIDE AFTER TERM at which it was rendered has expired: Freeman on Judgments, sec. 96; *Morgan v. Hays*, 12 Am. Dec. 147, and note; *Bramlett v. Pickett*, 12 Id. 350, and note.

THE PRINCIPAL CASE IS CITED in *Emory v. Whitwell*, 6 Mich. 474, and the questions decided in said principal case are discussed at length. See also Freeman on Judgments. 3d ed., sec. 72 a.

CASES
IN THE
HIGH COURT OF ERRORS AND APPEALS
OF
MISSISSIPPI.

HURT v. STATE.

[25 MISSISSIPPI, 378.]

VERDICT OF JURY FINDING PARTY ACCUSED OF MURDER GUILTY OF MANSLAUGHTER in the third degree of necessity operates as an acquittal of every crime of a higher grade. In contemplation of law, the jury in such case return two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime

VERDICT OF MANSLAUGHTER UPON TRIAL OF CHARGE OF MURDER is as much an acquittal of the latter charge as a verdict pronouncing the entire innocence of the accused would be.

JEOPARDY—VERDICT OF ACQUITTAL.—Verdict of manslaughter upon trial of charge of murder, being in effect an acquittal of the charge of murder, where the judgment upon the verdict of manslaughter is reversed upon a writ of error, the implied verdict of acquittal remains unaffected, as the writ of error brought to the consideration of the court only such proceedings of the court below as were prejudicial to the accused. In such a case the prisoner can not be again indicted for murder.

INDICTMENT DEFECTIVE IN SUBSTANCE.—When the court can not pronounce the proper sentence of the law upon a verdict finding the accused guilty, the indictment is defective in substance. In such a case, where the verdict is “guilty,” the party is remanded for another indictment. It is different where the verdict is “not guilty.”

ERROR from the circuit court of Hinds county. The opinion states the facts.

T. J. and F. A. R. Wharton, for the appellant.

David C. Glenn, attorney general, for the state.

By Court, FISHER, J. The plaintiff in error was indicted at the March term, 1851, of the circuit court of Hinds county, for murder. He appeared at the same term of the court, and filed certain pleas in abatement, alleging the illegal organization of the grand jury, to the indictment, to which pleas the district attorney demurred, which demurrer was sustained by the court. The prisoner afterwards, having pleaded not guilty, was put upon his trial at the March term, 1853, of said court, and was by the jury found guilty of manslaughter in the third degree. From the judgment rendered upon this verdict he prosecuted a writ of error to this court, assigning, at the hearing, the action of the court in sustaining the demurrer to the pleas in abatement as error, which having been considered as well assigned, the judgment of the court below has been reversed, and judgment rendered here overruling the demurrer and quashing the indictment. It is now insisted that the verdict of manslaughter is an acquittal of the charge of murder; and inasmuch as the statute of limitations will bar another indictment and prosecution merely for manslaughter, the prisoner is now entitled to his discharge.

The attorney general urges, in opposition to this motion, that the reversal of the judgment on the verdict of manslaughter annuls the whole proceedings upon the trial below, as well for as against the prisoner; and that the indictment having been avoided by the pleas in abatement, he can be again indicted for the crime of murder.

A verdict of a jury finding a party put upon his trial for murder guilty of manslaughter in the third degree must of necessity operate as an acquittal of every crime of a higher grade of which he might have been convicted under the indictment upon which the issue was made; otherwise the party, after undergoing the sentence for manslaughter, might be put upon his trial for the charge of murder, which would thus be only postponed, and not decided by the verdict of manslaughter.

The jury in such case, in contemplation of law, render two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. They must first determine his guilt or innocence upon the charge made by the indictment before proceeding to consider whether he is guilty of an inferior crime. The verdict of manslaughter is as much an acquittal of the charge of murder as a verdict pronouncing his entire innocence would be. for the

effect of both is to exempt him from the penalty of the law for such crime.

But it is said that such verdict only operates as an acquittal while it is permitted to stand as part of the action of the court below; and as it has been set aside by this court upon the prisoner's own application, the cause must be treated in all respects as if no trial had taken place. In support of this position authorities have been cited holding that when the judgment upon a trial for murder is arrested, the party may be remanded and again indicted for the same crime. The authorities doubtless announce the law correctly, but they have no application to the question under consideration. The judgment is only arrested in any case when the verdict is against the party. He would certainly never move, neither would the court for a moment entertain such motion, in arrest of the judgment when the verdict was in his favor. Here the verdict of the jury acquitted the party of the crime expressly charged in the indictment, and at the same time exempted him from the penalty of the law for its supposed commission. He could not move in arrest of the judgment on this part of the verdict, because the judgment corresponding in contemplation of law with the verdict in this respect, must also have been one of acquittal of the charge of murder. Whether this judgment was in fact pronounced by the court, as ought to be the practice, or attached by mere operation of law to the verdict, it was bound to be in the party's favor, and it could not, therefore, be arrested or set aside on his motion.

The same may in effect be said with regard to the action of this court upon the writ of error, which brought to its consideration only the judgment and proceedings of the court below, prejudicial to the accused. This was the final sentence upon the verdict of manslaughter, as no other threatened his liberty or in any manner affected his rights. He sought relief against no other. The judgment of reversal could extend only to such judgment and matters as the writ of error brought to our consideration. A judgment acquitting the party of murder, not being one which could be embraced in his writ of error, for the same reason could not be embraced in our judgment. Hence it stands, unaffected by our action, as the judgment of the court below on the charge of murder. It may be true that no formal judgment of acquittal was entered; but we hold that the sentence of the court upon the verdict of manslaughter was of itself a complete acquittal of all higher crimes of which the party

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might have been convicted under the indictment. It will not do to say that the reversal of the sentence against the party also destroys the verdict and judgment by operation of law in his favor. The former, being against the party, could be made the subject of revision upon a writ of error to this court. The latter, being in the party's favor, was final, conclusive, and irreversible. Neither he nor the state could ask a revision of such judgment upon a writ of error to this court; and having no power to revise it, we have no authority to reverse or annul it. It still stands, therefore, wholly unaffected by our action upon the writ of error. To this our mind is clear upon principle; but the question has been directly adjudicated by the supreme court of the state of Tennessee, and settled, in a well-considered opinion, as we have stated the rule: *Slaughter v. State*, 6 Humph. 410.

It is not necessary that we should go into an examination of the principles involved in the other question made by the attorney general. It may be admitted, for the sake of the argument, that the indictment was voidable, and still, under the record, the prisoner would be entitled to his discharge. The indictment purports to have been found by a grand jury organized by the court. The record shows that the prisoner was arraigned and regularly tried upon the charge therein contained, and that he was acquitted of the charge of murder upon the facts and testimony introduced before the jury. The statute is decisive of the question, and was no doubt enacted to relieve against such cases. It is in these words, to wit: "No person shall be held to answer on a second indictment for any offense of which he has been acquitted by the jury upon the facts and merits on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defects in the form or the substance of the indictment on which he was acquitted:" How. & Hutch. 690, sec. 5; Id. 725, sec. 20. An indictment is defective in substance, when the court can not pronounce the proper sentence of the law upon a verdict finding the accused guilty. In such case the judgment is arrested, and the party, according to the authorities, remanded for another indictment. While this may be the law, and the universal practice of the courts upon a verdict of guilty, it by no means follows that either the law or practice ought to be the same upon a verdict of not guilty. The party has gone through the legal form of a trial, and has by it established his innocence; and hence the wisdom of the statute in providing for such cases.

Let the prisoner be discharged.

CONVICTION OF LESSER CRIME ACQUITTAL OF GREATER.—A case which holds a doctrine somewhat similar to the principal case upon this point is *State v. Cooper*, 25 Am. Dec. 490; in this case it was held that a prisoner who had been convicted of arson, could not afterwards be tried upon an indictment for murder for the commission of the same arson, where the statute imposed the penalties of murder for this offense. The court, while discussing the question, say: "Had the prisoners at the bar been acquitted on the indictment for arson, it would have been conclusive of his innocence of that component part of the crime laid in this indictment, and would have necessarily barred a conviction under it:" Id. 494. See also *State v. Nowell*, 24 Id. 458, where it was held that the conviction of a person for manslaughter who was indicted for murder will be a good plea in bar to a subsequent indictment for the crime of murder. A person may be convicted of a less offense included in a greater offense charged in the indictment and may be acquitted of the latter: *Dinkey v. Commonwealth*, 55 Id. 542.

WHAT CONSTITUTES JEOPARDY: See *Commonwealth v. Loud*, 37 Am. Dec. 139; *Campbell v. State*, 30 Id. 417; *Crenshaw v. State*, 17 Id. 788; *State v. McKee*, 21 Id. 499, and cases referred to in the notes to above cases, which in some cases are very full.

THE PRINCIPAL CASE IS CITED in *Mumford v. State*, 39 Miss. 558, where the court decided that an acquittal on an indictment for a greater offense is a bar to a subsequent indictment for a less offense included in the greater, only where, under the indictment for the greater offense, the prisoner could be legally convicted of the less.

DAVIS v. HENDERSON.

[25 MISSISSIPPI, 549.]

NAME OF PRINCIPAL NEED NOT UNEQUIVOCALLY APPEAR FROM BILL OF EXCHANGE in order to exonerate the agent who draws it as such. It is sufficient if enough appears upon the face of the bill to put a prudent man upon inquiry before taking it.

INDORSEE OUGHT IN ALL CASES, WHEN CONSISTENT WITH JUSTICE, BE CONFINED TO CONTRACT as made and assented to by the principals thereto. This rule is relaxed only in favor of innocent holders, who have reason to believe from the language employed that no restrictions or limitations to the liabilities of the parties appearing to be bound was intended. But where it appears that with ordinary prudence the indorsee could have discovered what was intended by the contract, this limitation does not apply.

BILL DRAWN BY PARTY WHO SIGNS HIMSELF AS AGENT, and requests the drawee to "charge same to your agency at N.," discloses upon its face sufficient facts to put a prudent man upon inquiry as to whether the drawer signed in a representative capacity, or intended to bind himself personally.

ERROR from the circuit court of Adams county. The opinion sufficiently states the facts.

Gaiens and Martin, for the appellants.

James Carson, jun., for the appellee.

By Court, FISHER, J. The defendant in error was sued as the drawer and indorser of the following bill of exchange, to wit:

“Exchange for \$2,000.

NATCHEZ, March 4, 1846.

“Fifty days after sight of this only of exchange, pay to my own order two thousand dollars, value received, and charge the same to account of your agency at Natchez.

“Jno. D. HENDERSON, Agent.

“To STEPHEN FRANKLIN, esq., New Orleans.

“Indorsed: Jno. D. HENDERSON, Agent.”

The defense relied on is, that the bill was drawn and indorsed by the defendant, as the agent of the drawee, Stephen Franklin; and that it was not intended by either act to assume a personal responsibility. The counsel for the plaintiffs in error, on the contrary, insists that the bill having passed into the hands of third parties, and not disclosing on its face the name of the agent's principal, no other evidence can be admitted for this purpose. If it were necessary that the bill itself should unequivocally disclose the name of the principal, in order to exonerate the agent, this position would probably be correct. But this is not required. It will be sufficient if enough appears upon the face of the transaction to put a prudent man, before taking the bill, upon inquiry: *Mott v. Hicks*, 1 Cow. 513 [13 Am. Dec. 550]. Where it can be done consistently with justice and sound policy, an indorsee ought in all cases to be confined to the contract as made and assented to by the immediate parties thereto. This rule is only relaxed in favor of innocent holders, who, from the language employed by the original parties, had good reason to believe that the contract was subject to no conditions or restrictions as to the liabilities of the parties appearing to be bound thereby. But the reason of the rule ceases the moment it appears that the indorsee could not with ordinary prudence have been misled in regard to the terms of the contract.

The defendant, in drawing and indorsing the bill, attached to his name the word “agent.” It was, moreover, to be changed to the drawee's own agency at Natchez. These facts appearing upon the bill itself, if not conclusive evidence that the defendant was acting in a representative capacity, were at least sufficient to put a prudent man taking the bill from the drawee upon inquiry. What was he to ascertain by this inquiry? The precise terms of the contract, of course, as assented to by the

original parties. Having ascertained these terms, he at once learns that no one but the drawee is bound for the payment of the bill; for he is then informed that the defendant merely acted as the drawee's agent, and did not intend, by either the act of drawing or indorsing it, to bind himself personally.

Inasmuch as enough appeared upon the bill to enable the plaintiffs to learn the terms of the contract, and the extent of the defendant's undertaking, we are of opinion that the court committed no error in receiving the defendant's evidence, which shows that no liability existed on the part of the defendant to the drawee, from whom the plaintiffs received the bill; and as ordinary diligence would have placed them in possession of the terms of the contract, it is but right that they should be charged with notice of the facts as proved.

Under this view of the law, the judgment must be affirmed.

AGENT ACCEPTING BILL IN HIS OWN NAME DOES NOT BIND PRINCIPAL, but binds himself only: *Bank of Rochester v. Monteith*, 43 Am. Dec. 681. In the note to this case the previous cases in this series are collected upon the liability of an agent for contracts executed in his own name. See also *Gillaspie v. Weson*, 31 Id. 716; *Simonds v. Heard*, 34 Id. 41, and note, wherein it is said that whenever it appears upon the face of a simple contract made by the agent of a person named therein, and whom he can legally bind thereby, that he acts as agent, and intends to bind his principal, the law will give effect to his intention in whatever form expressed. A written contract, executed by an agent, must, in order to bind his principal, purport on its face to be his contract: *Clealand v. Walker*, 46 Id. 238; see also *Hall v. Huntoon*, 44 Id. 332; *Pitman v. Kintner*, 33 Id. 469, and notes. In *Newhall v. Dunlap*, 31 Id. 45, it was held that an agent who draws a bill in his own name is personally liable thereon, notwithstanding a request to charge to a particular account, and although the payee knew him to be an agent; but that the character in which an agent acts in drawing a bill may be shown as between himself and his principal, although he may be personally liable to third parties.

ROSS AND WAITE, EX'RS, v. HOUSTON AND CANNON.

[25 MISSISSIPPI, 591.]

NOTICE TO AGENT, given to him during the progress of the very transaction about which he is employed, is notice to the principal.

NOTICE GIVEN TO AGENT EMPLOYED TO PURCHASE PROPERTY, of any defect in the title or quality of the property, is notice to the principal, in any controversy between him and the vendor in relation to such property.

AGENT EMPLOYED TO SELL PROPERTY, WHO ACQUIRES NOTICE OF DEFECTS IN TITLE or quality thereof, is bound to disclose such defects to the purchaser to the same extent that the principal would have been, and this though the principal may not have known such facts himself.

WHEN PARTY NOT AFFECTED BY NOTICE TO HIS AGENT.—Party purchasing property through an agent is bound by notice to such agent, acquired in that transaction, of the rights of third parties, in any controversies with such parties; but where such agent does not inform his principal of such facts, the knowledge thereof by said agent will not be treated as implied notice, so as to affect the conscience of the principal in any subsequent sale of the property made by him.

ERROR from the circuit court of Marshall county. The facts are sufficiently stated in the opinion. The jury found for the defendants below.

Stearns and Glenn, for the plaintiffs in error.

Watson, for the defendants in error.

By Court, **YERGER, J.** James C. Alderson, by his agent, George West, became the purchaser, at a sale made by virtue of an execution against Nathaniel Anderson, of a tract of land. This land he afterwards sold to the defendant Houston by a quitclaim deed, Houston being informed of the manner in which Alderson acquired his title. The defendants, who are sued upon a writing obligatory given for the purchase money, resist payment upon the ground that they were deceived and defrauded by Alderson in the sale of the land, while they admit that Alderson only sold by a quitclaim deed, and that they knew he had obtained title to the land by virtue of an execution sale of it, as the property of Nathaniel Anderson; and that they took upon themselves the risk of the validity and legality of the execution, and the sale under it, so far as the proceedings connected with the sale disclosed upon their face the facts of the case; yet they say that the sale under the execution to Alderson was fraudulent and void, which fact was known to Alderson, but concealed by him from them. It appears from the pleadings and proof that when the sale under the execution against Anderson was made, he was not the owner of the land, but had previously sold and conveyed it by deed to A. F. Hopkins & Co. It also appears that West, the agent by whom Alderson purchased the land, had notice when he made the purchase for Alderson that Anderson did not own the land, and that he had no interest in it. But it does not appear that Alderson knew these facts when he sold to Houston; or that West, the agent by whom he purchased, ever communicated to him the knowledge he had received on the subject; or that notice had ever been given to him at any time that Anderson did not own the land, and that it belonged to A. F. Hopkins & Co.

On this state of facts, it is contended by Houston and Cannon that although Alderson did not have notice in fact, the notice given to West, the agent, was notice in law to Alderson of the title of Hopkins & Co.; and though he did not actually know, when he sold to the defendant, that the land belonged to Hopkins & Co., yet, as the agent through whom he became the owner of the land did know this fact, the law will charge him with knowledge of all the facts of which his agent had notice.

It is certainly true as a principle of law, founded upon reason and sound policy, that wherever a party purchases property through the agency of another, notice communicated to that agent during the progress of that negotiation, of the rights of third parties to the property, will be held, in any controversy with such third parties in relation to it, as equivalent to direct notice to the principal: 2 Sugd. on Vend. 215.

So, too, notice given to an agent employed to purchase property of any defect in the title or quality of the property will be equivalent to notice of those facts to the principal, in any controversy that may arise between him and the vendor in relation to the property.

We think it may also be fairly deduced from the adjudged cases and from principle that if a party employ an agent to sell property, and notice be given to that agent of such defects in the title or quality of the estate, which, if known to the principal, it would have been his duty to disclose to the purchaser, it would be the duty of the agent also to disclose them to the purchaser; and in the event of his failure to do so, that the purchaser might be relieved from the contract in the same manner and to the same extent that he would have been relieved if the principal had known the facts and made the sale without disclosing them; and this, too, although the principal, when his agent made the sale, was ignorant of the defects, the title, or quality of the estate. This is certainly as far as any adjudged case or any sound legal principle would warrant the court in extending this doctrine of implied notice.

But the case before us does not fall within the operation of either of the foregoing rules. On the contrary, the attempt is now made to extend the doctrine still further, and we are asked to declare not only that notice given to an agent to buy property shall affect the conscience of the principal in every matter touching the purchase of the property, and the title thereby acquired, so far as the rights of third parties exist in relation to the property, but also that knowledge of defects in the title or

quality of the estate thus possessed by an agent employed to purchase shall be considered in law as made known, though in fact they were not made known, to the principal, so as to affect his conscience in any future sale he might make of the property.

We do not believe either the law or sound policy will warrant such an extension of the rule.

So far as the rule has heretofore been established, that notice to the agent shall be treated as notice to the principal, we are willing to enforce it as a rule of sound policy, although in individual cases it may sometimes operate harshly. But we are not willing to extend it further than it has heretofore been carried; and we are therefore of opinion that if Alderson at the time he sold to Houston did not know in fact that he had acquired no title to the land by the purchase under the execution sale against Anderson, because the land belonged to A. F. Hopkins & Co., and not to Anderson, the notice of those facts given to West, the agent by whom he purchased the land, will not be treated as implied notice, so as to affect his conscience in the subsequent sale made by him of the property, and thereby entitle the purchaser to insist upon an avoidance of his contract.

As the circuit judge laid down the law differently, we must reverse the judgment, and remand the cause.

NOTICE TO AGENT: See *Reynolds v. Ingersoll*, 49 Am. Dec. 57; *Barnes v. McClinton*, 23 Id. 62; *Woodfolk v. Blount*, 9 Id. 736; *Bank of Pittsburgh v. Whitehead*, 36 Id. 186. In the note to this latter case the subject is extensively discussed.

PRINCIPAL IS LIABLE FOR HIS AGENT'S FAILURE TO DISCLOSE to a purchaser of sheep, which he is authorized to sell, the fact that they are diseased, where that fact is known to the agent, and for all damages occasioned thereby: *Jeffrey v. Bigelow*, 28 Am. Dec. 476.

EX PARTE ADAMS.

[25 MISSISSIPPI, 883.]

COURTS HAVE INHERENT POWER TO PUNISH CONTEMPTS of their authority by fine and imprisonment, independent of any statutory provision.

JUDGMENT OF COURT OF COMPETENT JURISDICTION, ACTING WITHIN SCOPE OF ITS AUTHORITY, is conclusive and binding until reversed or set aside, either by itself or by the proper appellate court.

UPON MOTION TO DISCHARGE UPON HABEAS CORPUS PERSON COMMITTED upon order of court, the only question which the court can consider is, Did the court which made the order of commitment have jurisdiction over the party and the subject-matter? If it did not, the judgment was *coram non judice* and void, and the prisoner would be entitled to his discharge.

UPON MOTION TO DISCHARGE UPON HABEAS CORPUS, where the commitment was made by a court of competent jurisdiction, there is no authority to discharge the party upon the ground that the court erred in its judgment of the law.

WHERE COURT COMMITS PARTY FOR CONTEMPT, ITS ADJUDICATION IS CONVICTION, and its commitment an execution. Upon *habeas corpus*, the court hearing the same can no more inquire into the propriety of such conviction than it can upon a verdict of guilty upon a charge of misdemeanor inquire whether improper charges were given to the jury or improper evidence was admitted against the prisoner.

INSUFFICIENT RECORD OF CONVICTION.—The law requires that before sentence of imprisonment is passed upon a party he must first be convicted of an offense. This conviction is generally by verdict of a jury, but in cases of contempts may be by judgment of the court. In either case the record should show a conviction. Hence a return to a writ of *habeas corpus*, which recites an order of court that "A. be sent to jail, and remain there," etc., is insufficient, as it contains no adjudication of the court that A. has been guilty of contempt.

MOTION to discharge George H. Adams upon *habeas corpus*. The opinion states the facts.

Guion, for the motion.

Glenn, attorney general, and *Hooker*, contra.

By Court, YERGER, J. In this case George H. Adams obtained a writ of *habeas corpus* from the Hon. Richard Barnett, returnable before me, on a petition and affidavit that he was illegally held in custody by John P. Oldham, the sheriff of Hinds county. In answer to the writ, the sheriff has returned that he holds the petitioner in custody by virtue of an order made by the circuit court of Hinds county, which order is in the following words: "Ordered, that George H. Adams be sent to jail, and remain there until he signifies his assent to the court to answer questions to the grand jury, or until the final adjournment of said grand jury at this term of the court."

The questions which have been argued by counsel are of very great importance, involving on the one hand the right of the citizen to freedom from unlawful and arbitrary imprisonment, and on the other, the power of the courts of the country to punish by imprisonment or fine for contempts committed against them and their authority. For the state, it is insisted that as a judge sitting to try a question on *habeas corpus* I have no power to examine into the validity of the order of commitment, but must, upon the return made by the sheriff, remand the petitioner.

By the provisions of our statute on the subject of *habeas cor-*

pus, it is declared that "whenever any person detained in custody, charged with a criminal offense, shall by himself, or some other person in his behalf, apply to the supreme court, or any circuit court of law, or court of chancery in this state, or to any judge thereof in vacation, for a writ of *habeas corpus ad subjiciendum*, shall show by affidavit or other evidence probable cause to believe that he is detained in custody without lawful authority, it shall be the duty of the court or judge to whom such application is made forthwith to grant the writ," etc.: Hutch. Code, 999. By the fourth section of this statute it is made the duty of the "court or judge before whom the prisoner may be brought to proceed without delay to inquire into the cause of his imprisonment, and either discharge him, admit him to bail, or remand him into custody, as the law and the evidence shall require:" Id. 1000. The same remedy by *habeas corpus* is given by the eighteenth section of the statute to "person restrained of their liberty under any pretense whatever." By the fifteenth section of the statute the judge or court is prohibited from discharging any person suffering imprisonment under lawful judgment, founded on a conviction of some criminal offense: Id. 1002. It is contended by the district attorney that the prisoner is lawfully imprisoned for a contempt of the authority of the court in refusing to answer a question asked him by the grand jury. For the petitioner, it is insisted that the question asked him was improper and illegal, and that he was not bound by the laws of the land to answer it.

On this branch of the case two questions arise: 1. Has the circuit court power to imprison a party for a contempt? 2. If so, can a party be discharged from the judgment of that court directing an imprisonment for a contempt by a direct proceeding on *habeas corpus*?

In regard to the first point, it may be stated that the legislature has declared that the "circuit court shall have power to fine and imprison any person who may be guilty of a contempt of the court while sitting, either in the presence or hearing of such court; provided that such fine shall not exceed one hundred dollars, and no person for such contempt shall be imprisoned for a longer period than the term of the court at which the contempt shall have been committed:" Hutch. Code, 737. See also page 861, sections 108, 109, which provide that a witness who refuses to testify shall be committed to prison by the court, there to remain without bail or mainprise, until he shall give evidence.

Indeed, the right of all courts of justice to punish by fine and imprisonment for contempts of their authority is an inherent right pertaining to them, and which they would have lawful power to exercise independent of any statute.

Conceiving the point indisputable, then, that the circuit court has the power to fine or imprison for contempt, I am brought to the consideration of the second proposition, to wit, can a party be discharged from the judgment of that court directing his imprisonment for contempt by proceeding on *habeas corpus*?

There is no principle more fully established in our jurisprudence than this, to wit, the judgment of a court of competent jurisdiction, acting within the scope of its jurisdiction, is binding and conclusive upon all the world, until its judgment has been reversed or set aside by itself or by some superior tribunal having authority for that purpose. Upon an application by *habeas corpus* to discharge a party from a commitment for contempt, the only question which the judge trying the writ can ask himself is this: Did the court which made the order of commitment have jurisdiction over the party and over the subject-matter? If it did not, then the judgment would be *coram non judice* and void, and the party would be entitled to his discharge. But if the objection be, not that the court had no jurisdiction of the case, but acting in the bounds of its authority it made an erroneous application in its judgment of the law, then I conceive that, sitting as a judge to try the writ of *habeas corpus*, it would not be competent for me to enter into the inquiry whether the judgment was erroneous or not. This principle will be found to pervade all the decisions made in this country and in England upon this subject.

In a very early case of *Bross Crosby, Mayor of London*, 3 Wils. 188, which was an application to the court of common pleas for a *habeas corpus* to bring up the body of the lord mayor, who was committed for contempt by the house of commons, the writ was granted on the return, the causes of commitment were set out. It was argued for the prisoner that the house of commons had no authority to commit for a contempt; and if they had, that they had not used it rightly and properly, and that the causes assigned were insufficient; but the whole court was of opinion that the house of commons could commit for a contempt, and that the court could not revise its adjudication for error. Lord Chief Justice De Grey on that occasion remarked: "When the house of commons adjudged anything to be a contempt or breach of privilege, their adjudication is a conviction, and their

commitment in consequence is an execution, and no court can discharge a person that is in execution by the judgment of any other court; this court can do nothing when a person is in execution by the judgment of a court having competent jurisdiction. In such a case, this court is not a court of appeal." Again he remarked: "The court of king's bench or common pleas never discharged any person committed for a contempt in not answering in the court of chancery, if the return was for a contempt. If the admiralty commits for a contempt, or one be taken up on *excommunicato capiendo*, this court never discharges the persons committed."

In the celebrated case of *Regina v. Paty*, 2 Ld. Raym. 1105, occurring in the time of Queen Anne, being a writ of *habeas corpus* sued out in the court of queen's bench, for their discharge from a commitment for contempt by the house of commons, that court held that it had no authority to inquire into the sufficiency of the cause of commitment. In this case, it is true, the justly distinguished Lord Holt was of opinion that the parties were entitled to be liberated; but he was overruled by the other eleven judges. In remarking on this case, Lord Campbell, a jurist remarkable for his learning and ability as well as his liberal principles, uses the following language: "Holt was carried away by excusable indignation to hold that they were entitled to be liberated; but he was properly overruled by the other judges, on the ground that the court had no power to examine into a commitment by either house of parliament:" 4 Campbell's Lives of the Lord Chancellors, 165. It is worthy of remark, too, that the opinion of Holt, C. J., proceeds rather upon the ground of a want of power or jurisdiction in the house of commons, in the case before him, than upon an erroneous judgment and application of the law where it had unquestioned jurisdiction.

Blackstone, on this subject, has stated the rule of law in the following language: "All courts, by which I mean to include the houses of parliament and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempt, and the punishment thereof, belongs, exclusively and without interfering, to each respective court. Infinite confusion and disorder would follow if courts could, by writs of *habeas corpus*, examine and determine the contempt of others:" See case of *Regina v. Paty*, *supra*. This whole subject underwent a very elaborate investigation in England, in the late case of *Stockdale v. Hansard*, 9 Ad. & El. 1; 36 Eng. Com. L. 1; and the opinion of the judges accorded with that already an-

nounced by me, to wit: "Where a commitment for contempt is made by a court of competent jurisdiction, there is no authority to discharge the party upon the ground that the court erred in its judgment of the law." In the opinion of Justice Patteson, the following language was used: "When a person is committed for a contempt by the house of commons the court can not question the propriety of such commitment, or inquire whether the person had been guilty of contempt, in the same manner as this court can not entertain any such question if the commitment be by any other court having power to commit for contempt. In such instance there is an adjudication of a court of competent authority in the particular case, and the court which is desired to interfere, not being a court of error and appeal, can not entertain the question whether the authority has been properly exercised. Upon an application for a writ of *habeas corpus*, by a person committed by the house, the question of the powers of the house to commit, or of the due exercise of that power, is the original and primary question propounded to the court, and arises directly. Now, as soon as it appears that the house has committed the person for a cause within their jurisdiction, as, for instance, for a contempt, so adjudged to be by them, the matter has passed *in rem adjudicatum*, and the court before which the party is brought by *habeas corpus* must remand him."

Similar language was used by the other judges. Such, then, is the rule established by the English courts on this question. Have the courts in the United States varied the rule? Upon as full an examination as I have been able to give this question since it was submitted to me, I can not find that they have.

In New York, in the *Case of Yates*, 4 Johns. 318, the rule was laid down as it had been by the English judges. In the opinion in the case, of Kent, C. J., he reviewed the English cases, and remarked that "there was not an instance in the English law of a judge in vacation undertaking to decide upon the legality of a commitment in execution by the judgment of any court of record, and much less of a court of the highest degree." He even extended the rule so far as to hold that if upon the return of a writ of *habeas corpus* awarded in vacation it appears that the prisoner stands committed by the judgment of a court of record, or other court of competent authority, the judge is bound immediately to remand the prisoner, and he has no power to examine and decide touching the legality of the judgment or the jurisdiction of the court. These questions belong to the cognizance of the supreme court, as possessing general appellate

powers, and as having the supreme control of all inferior courts. While I most respectfully dissent from one position taken by the chief justice, to wit, that a judge on trying the *habeas corpus* "can not examine the jurisdiction of the court," yet I feel confident that the other position is fully sustained by the law, to wit: "If the jurisdiction be admitted, the judge has no power to decide touching the legality of the judgment, or whether it be erroneous or not." In relation to a judgment made by a court without jurisdiction, the chief justice stated in the same opinion that "a proceeding without jurisdiction is void and a mere nullity."

The power to discharge on *habeas corpus* from a commitment for contempt came up before the supreme court of the United States in *Ex parte Kearney*, 7 Wheat. 44. And in that distinguished tribunal, where Story then held a seat and John Marshall presided, it was unanimously held, Judge Story delivering the opinion of the court, that a "writ of *habeas corpus* is not deemed a proper remedy where a party was committed for a contempt by a court of competent jurisdiction, and that if granted, the court could not inquire into the sufficiency of the cause of commitment, and they were bound to remand the party, unless they were prepared to abandon the whole doctrine so reasonable, just, and convenient, which has hitherto regulated this important subject." The law has been ruled in the same way in Indiana, in Kentucky, in Georgia, and in Tennessee: *Clark v. People*, 1 Breese, 340 [12 Am. Dec. 177]; *State v. Tipton*, 1 Blackf. 166; *Bickley v. Commonwealth*, 2 J. J. Marsh. 575; *State v. White*, T. U. P. Charlt. 136; *Ex parte Martin*, 5 Yerg. 456 [26 Am. Dec. 276].

The argument has been pressed very earnestly, that unless the power to discharge in *habeas corpus* exists, an arbitrary and irresponsible power may exist in the courts of the country, by which the rights and liberties of the citizens may be taken away without remedy. The same argument was used before the supreme court of the United States in *Ex parte Kearney*, before referred to; but that court replied: "Where the law is clear, this argument can be of no avail, and it will probably be found that there are also serious inconveniences on the other side. Wherever power is lodged it may be abused. But this forms no solid objection against its exercise; confidence must be reposed somewhere, and if there should be an abuse, it will be a public grievance for which a remedy may be applied by the legislature, and is not to be devised by courts of justice."

In the decision made by Judge Thatcher in *Ex parte Hickey*,

4 Smed. & M. 751, I do not find anything which conflicts with the view of the law taken by me in that case. Judge Thatcher discharged Hickey, among other reasons, upon the ground that the circuit court had no power or jurisdiction to commit for contempts not committed in the presence of the court. The power to commit in that case was denied, but I apprehend if the power had been admitted, the judge would not have decided that he had any right to examine whether it had been erroneously exercised or not. Indeed, I think the power to discharge on *habeas corpus*, from a commitment for contempt, ordered by a court of competent jurisdiction, is expressly taken away by the *habeas corpus* act itself, which, among other things, declares that a person "shall not be discharged out of prison who is suffering imprisonment under lawful judgment founded on a conviction of some criminal offense:" Hutch. Code, 1002.

It would not be pretended, if the petitioner had been convicted by the verdict of a jury of a misdemeanor, and sentenced by the court to imprisonment therefor, that I could discharge him on the ground that erroneous and improper charges were given by the court, or that illegal and improper evidence was admitted against him; every person would admit that I could not enter at all into such an investigation, and that it could only be done by an appellate court. Yet the supreme court of the United States declares "there is no distinction in principle between that case and a judgment of imprisonment against a party for contempt, for when a court commits a party for contempt, their adjudication is a conviction, and their commitment in consequence is execution:" *Ex parte Kearney*, 7 Wheat. 43. If, then, it should appear from the return to a writ of *habeas corpus* that the party was imprisoned by the judgment of a court of competent jurisdiction for a contempt committed in its presence, I would feel precluded by the statute from discharging the prisoner.

It is true, the high court of errors and appeals has held that on a writ of error and *supersedeas* being awarded in a criminal case not capital, they may admit the prisoner to bail to appear and abide the judgment of the appellate court. Whether a writ of error would lie from a judgment of imprisonment for contempt in this state has never been decided. In some states it has been held that a writ of error would lie. In others, that it would not. Should it be held that it would lie in this state, I presume the party would be bailable till trial and judgment, as in other cases of criminal convictions.

From a review of the law applicable to this case, I am satisfied, if it appeared from the return that the prisoner was imprisoned by the judgment of the circuit court of Hinds county for a contempt of the authority of that court, that I could not enter into an examination in this proceeding, whether the questions asked the witness and refused by him to be answered were legal or not. I think that would be a question which could only be reviewed, if it could be reviewed at all, by an appellate tribunal, and I would therefore be bound to remand the prisoner. But the return set out in this case is, in my opinion, insufficient to justify his imprisonment. It does not appear from that return that there has been any conviction or judgment of the circuit court of Hinds county that Mr. Adams was guilty of a contempt. The order set out is, that "George H. Adams be sent to jail, and remain there until he signifies his assent to the court to answer questions to the grand jury," etc. It was formerly held that a judgment for contempt, which did not set out the particular cause on which it was founded, was a nullity, and that a party was entitled to be discharged from it. But the more recent cases have laid down the rule that the judgment will be sufficient if it express on its face that it was for a contempt generally, and that the specific cause need not be set out: *Ex parte Summers*, 5 Ired. L. 149; *Stockdale v. Hansard*, 9 Ad. & El. 1; S. C., 36 Eng. Com. L. 1.

But it is clear that a general order to imprison a party unless he has been convicted either by a jury or by the court is a mere nullity. The law requires that before a sentence of imprisonment shall be passed against a party, that he should be first convicted of an offense. In ordinary cases, this conviction must be by the verdict of a jury. In the case of contempts, it may be by the judgment of the court. Still, in either case, the record must show a conviction. Now, it will be seen from this return that there is no judgment of imprisonment for a contempt generally, or for a contempt in refusing to answer questions. There is not any conviction or adjudication by the court that Mr. Adams had been guilty of a contempt. Without such judgment the court had no right to commit him to prison, nor the sheriff to detain him. It is true, and was admitted on the argument, that Mr. Adams did refuse to answer questions asked by the grand jury, and it may be true that the court considered that a contempt for which he deserved imprisonment, but no such judgment has been rendered in the case, and however many contempts the prisoner may have committed, it is not

lawful to imprison him until convicted thereof by the judgment of the court, which judgment and conviction must appear by the record. For this reason, I direct that he be discharged from custody.

COURTS HAVE INHERENT POWER TO PUNISH FOR CONTEMPTS, independent of any statute: *Brown v. Brown*, 58 Am. Dec. 641, and note. The principal case is cited to the point that the authority to punish for contempt is a necessary incident, inherent in the very organization of all legislative bodies, and of all courts of law or equity, independent of statutory provisions, in *State v. Matthews*, 37 N. H. 453; *Watson v. Williams*, 36 Miss. 345; *Ex parte Stickney*, 40 Ala. 161.

JUDGMENT OF SUPERIOR COURT IS NEVER VOID, but only voidable by plea in error: *Borden v. State*, 54 Id. 217, and note; *Ponder v. Moseley*, 48 Id. 194; *Douglas v. Massie*, 47 Id. 375, and note.

HABEAS CORPUS QUESTIONS DECIDED IN PRINCIPAL CASE ARE DISCUSSED at length in the notes to *Commonwealth v. Lecky*, 26 Am. Dec. 37, and *People v. McLeod*, 37 Id. 328. See also Hurd on Habeas Corpus, 405, 409, where the principal case is cited, together with many others holding a similar doctrine. In Church on Habeas Corpus, 394, 412, 419, 436, the author cites the principal case with approval.

PERKINS v. HACKLEMAN.

[26 MISSISSIPPI, 41.]

PARTY INTENDING TO COMMIT TRESPASS ON PUBLIC LANDS, and by mistake committing trespass upon lands of private individual, is liable for such trespass in penal damages.

PARTY SUPPOSING HIMSELF TO BE CUTTING TIMBER ON HIS OWN LAND, but by mistake cutting on another's land, is liable for the actual damage done.

TRESPASS. Appeal from the circuit court of Octibbeha county: Elizabeth Hackleman *et als.*, plaintiffs; John W. Perkins, defendant. Plaintiffs obtained judgment in the lower court, and defendant appealed, assigning error in the court refusing to give the following charge: "That under the statute upon which this action is brought the defendant Perkins would not be liable for the acts of his agents unless acting within the scope of their authority."

James T. Harrison, for the plaintiffs and appellees.

Crusoe, for the defendant and appellant.

By Court, YERGER, J. This is an action of debt brought under the provisions of the statute for cutting down timber-trees on the land of the defendants in error: Hutch. Code, 280.

The facts proved made out a case falling clearly within the provisions of the statute. The timber was cut down during a series of years for the purpose of stripping the bark off, to be used in tanning. The proof shows that it was cut on the land of the defendants in error by direction of the plaintiff in error, and the pretense that he supposed the land belonged to the government, and not to defendants in error, will not avail him. In the first place, it is not true in point of fact, because it is in proof that in 1846 the defendant was shown the lines of this tract of land, told that it belonged to defendants in error, and that his hands were cutting timber on it; yet he continued cutting for several years afterwards. But to give defendant the full benefit of the defense attempted by him, it is clear that he is liable to the penalty of the statute. We think the rule laid down in Alabama under a similar statute correct. If a party intending to commit a trespass on public lands through mistake cut down trees on the land of another person, he is liable to the penalty: *Givens v. Kendrick*, 15 Ala. 648.

The case would be different, if, intending to cut upon his own lands, by mistake he should go beyond his own boundary and cut timber on the land of another, supposing he was cutting on his own. In such a case, we would incline to think he would not be liable to the penalty, but only for the actual damage done. Although the verdict and judgment are not strictly technical and formal, yet as no injury can result therefrom to the plaintiff in error we will not disturb them.

Let the judgment be affirmed.

TRESPASS DE BONIS ASPORTATIS may be maintained by the owner of land for removal of wood cut and severed from the freehold, although such owner was not in actual possession: *McClain v. Todd's Heirs*, 22 Am. Dec. 37. Party cutting trees on public lands stands in the same position with trespassers on private property: *Turley v. Tucker*, 35 Id. 449, and note citing other cases.

THE PRINCIPAL CASE WAS CITED ARGUENDO in *Mhoon v. Greenfield*, 52 Miss. 434, and relied on as authority and followed in *McCleary v. Anthony*, 54 Id. 713, a case which closely resembled the principal case.

WHITFIELD v. ROGERS.

[26 MISSISSIPPI, 84.]

INJUNCTION WILL NOT LIE FOR EVERY COMMON TRESPASS, where it is only contingent and temporary; but if it continue so long as to become a nuisance, an injunction will then be granted.

PRIVATE INDIVIDUAL MAY OBTAIN INJUNCTION TO PREVENT PUBLIC MISCHIEF by which he is affected in common with others.

INJUNCTION. Appeal from the northern district chancery court at Fulton. William P. Rogers, plaintiff; Hatch Whitfield, defendant. The facts are stated in the opinion.

Lindsey and Copp, for the plaintiff and appellee.

Goodwin and Sale, and O. H. Whitfield, for the defendant and appellant.

By Court, **HANDY, J.** This was a bill filed in the district chancery court at Fulton, by the appellee, against the appellant, to enjoin him from the erection of a mill-dam. The bill alleges, in substance, that the complainant's lands, which lay in the vicinity of the mill-dam about to be made, would be inundated by the construction of it, so that their value would be greatly lessened and much of the timber killed by the damming up of the water; and that the health of the neighborhood would be greatly injured by the stagnation of the water produced by the dam. The answer denies the material allegations of the bill, and much testimony was taken on both sides. The vice-chancellor directed the following issues to be tried in the circuit court of Monroe county, where the matter complained of was located: 1. Whether the mill-dam would operate a private nuisance to the complainant; 2. Whether or not it would operate a public nuisance to the neighborhood in which it was to be erected. And on the trial in the circuit court, the jury found a verdict that it would operate as a public nuisance; upon the return of which verdict to the vice-chancery court, a perpetual injunction was decreed; and hence the case is brought to this court.

1. It is insisted, in the first place, on the part of the appellant, that the complainant was not entitled to relief in equity on the ground of the private nuisance, because relief in equity will only be granted in such cases where the mischief is irreparable and can not be compensated in damages. Authorities are to be found holding this doctrine; but the modern and more approved cases extend the relief in equity much further, upon the just principle of interposing to prevent the evil rather than to compensate for it after it has been committed. Thus it is held to apply to cases of diversion of watercourses or pulling down banks and exposing the complainant to inundation: *Eden on Inj.* 269; *Robinson v. Byron*, 1 Bro. C. C. 588; *Lane v. Newdigate*, 10 Ves. 194. In *Coulson v. White*, 3 Atk. 21, Lord Hardwicke said: "Every common trespass is not a foun-

dation for an injunction, where it is only contingent and temporary; but if it continue so long as to become a nuisance, the court interferes, and will grant an injunction." Judge Story lays down the rule thus: In order to give the jurisdiction, he says "there must be such an injury as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which can not be otherwise prevented but by an injunction:" 2 Story's Eq. Jur., sec. 925.

These principles fully justify the relief sought in this case. The inundations occasioned by the erection of the dam, the injuries thereby caused to the complainant's lands, and the periodical destruction of his timber did not constitute a single trespass, but from their nature must have been "constantly recurring grievances." It would have been unreasonable and oppressive to force the complainant into a court of law to redress each repetition of the injury as it might recur from time to time; and therefore, on the very principle of "suppressing interminable litigation," and of "preventing multiplicity of suits," courts of equity alone can give just and adequate relief in such cases.

2. The appellant urges that the complainant was not entitled to an injunction on the ground of a public nuisance, because a private individual can not come into a court of equity for relief from a public nuisance unless he avers and proves some special injury; and that there is no such averment in this case. He contends that the proper mode of proceeding is by indictment at law, or by information in equity, at the suit of the attorney general or the state. We do not think these positions well founded.

An indictment could only result in an abatement of the nuisance after it had been committed. It could not prevent the mischief arising from it before the indictment could be tried and the judgment carried into execution. That remedy would therefore be inadequate.

As to the right of the complainant to seek the relief, the bill states that the health of the neighborhood would be greatly injured by the stagnation of water produced by the dam, and it shows that the complainant's lands lay within a short distance of it, and would be affected by it. His property, therefore, as a place of residence, or as a plantation and abode of slaves, must necessarily have been injured; and this must strike the

mind almost as forcibly as if it had been distinctly alleged in the bill that this cause of disease would extend to him or his family or slaves, or would diminish the market value of his lands. But it appears by the proof that he resides upon the lands; so that it sufficiently appears he was subject to the evil complained of. It is well settled that a private individual may obtain an injunction to prevent a public mischief by which he is affected in common with others: *Eden on Inj.* 267. Judge Story says a court of equity will interfere in such cases, "upon the application of private parties directly affected by the nuisance:" 2 *Story's Eq. Jur.*, sec. 924; *City of Georgetown v. Alexandria Can. Co.*, 12 *Pet.* 98.

But here the matter is not only presented as a public nuisance, but it is also alleged that a special injury, apart from the mischief to the public health, would be sustained by the complainant in the damage to his lands and timber. This will justify a private individual in seeking relief for a public nuisance producing special injury to himself: *Crowder v. Tinkler*, 19 *Ves.* 622; *City of Georgetown v. Alexandria Can. Co.*, *supra*.

No objection is made to the sufficiency of the evidence to sustain the verdict, and it must be taken as correct, and to support the allegations of the bill.

We are therefore of opinion that there is no error in the decree, and it must be affirmed.

INJUNCTION DOES NOT LIE TO PREVENT MERE ORDINARY TRESPASS: *Smith v. Pettingill*, 40 *Am. Dec.* 667, and note citing prior cases in this series.

BILL TO ENJOIN PUBLIC NUISANCE lies at the instance of a private individual who is injuriously affected thereby: *Rosser v. Randolph*, 31 *Am. Dec.* 712; *Bigelow v. Hartford Bridge Co.*, 36 *Id.* 502; *White v. Flannigan*, 54 *Id.* 668, and notes.

STRINGFELLOW v. STATE.

[26 *MISSISSIPPI*, 157.]

LEADING QUESTION IS ONE WHICH DIRECTLY SUGGESTS ANSWER required—
or which embodies a material fact, and admits of a simple negative or affirmative.

WHERE QUESTION LEADING IN FORM IS ASKED which merely relates to the subject-matter, it should be allowed.

EXTRAJUDICIAL CONFESSIONS OF PRISONER, where the *corpus delicti* is not proved by independent testimony, are insufficient to warrant a conviction of the accused in capital cases.

HOMICIDE. Appeal from the circuit court of Issaquena county. Richard Stringfellow was indicted for the murder of Decatur

Whitley, and at the last November term of said court was convicted and sentenced to be hanged. He moved for a new trial, assigning error in the court admitting illegal testimony on the part of the state, and the refusal to grant certain instructions prayed for by the accused, all of which are fully set out in the opinion.

Glenn, attorney general, for the state.

F. Anderson and C. L. Buck, for the appellant.

By Court, SMITH, C. J. The plaintiff in error was indicted and tried in the circuit court of Issaquena, and convicted of the murder of Decatur Whitley. The bill of exceptions filed to the decision of the court overruling the motion for a new trial embodies the whole of the evidence submitted to the jury. Several exceptions were taken to the ruling of the court in reference to the admission of evidence on the trial. The charges of the court and its refusal to instruct the jury as requested by the counsel for the plaintiff in error are made the grounds of exception. The bills of exception filed to these various acts of the court present the questions which it becomes our duty to examine and decide. The questions arising upon the introduction of evidence naturally present themselves first for our consideration.

During the examination in chief of a witness called on the part of the prosecution, the following question was propounded by the prosecuting attorney: "Did you ever receive a letter purporting to be from Decatur Whitley? and if so, at what place was it written and dated, where postmarked, and when did you receive it?" To which the prisoner's counsel objected, without stating the ground of objection. The court disallowed the exception, and permitted the witness to answer. The witness answered as follows, to wit: that he had received a letter purporting to have been written by Whitley. It was postmarked at Ashton, and was dated on the inside from the island of Bunch's Bend Cut-off; that he did not remember the date of the letter. It was received by him about three weeks before he came to Mississippi, in the latter part of October or the first of November. The answer was excepted to, but the objection was overruled, and it was permitted to go to the jury.

It is now insisted that the question was a leading one, and the answer thereto illegal and incompetent evidence.

A leading question has been defined to be one which directly suggests the answer which is desired, or which embodies a

material fact and admits of an answer by a simple negative or affirmative, though neither the one nor the other be directly suggested: 2 Phill. Ev. 401; 1 Greenl. 553. But in the examination of a witness, if the object be to direct his mind with the more expedition to what is material, and if the question propounded relate merely to introductory matter, it should not be objected to, although in form it be leading. Hence it is not unfrequently a matter of great difficulty to distinguish between those questions which are not to be tolerated because they are leading and those which are such in form but in effect are only calculated to lead the mind of the witness to the subject of inquiry. So in the case under consideration, if the question be determined by the test above laid down, it is at least very doubtful whether it should be held objectionable on the ground that it is leading; but if tried by the principle recognized in *Turney v. State*, 8 Smed. & M. 104 [47 Am. Dec. 74], it would seem clearly to be exceptionable on that account. In that case, after a witness, who had previously testified that about the first of December, 1844, the defendant had committed a rape upon her, was asked, on her examination in chief, by the district attorney: "If defendant then, or at any subsequent time, said anything to you in relation to this matter to dissuade you from disclosing it? State when, and where, and what he said." Again: "If defendant, in any of his antecedent conversations, offered property or any other advancement to you, in order to attach you to him, say so." And again the witness was asked: "If any time subsequent to this transaction defendant said anything about what punishment the laws of Mississippi would inflict on him or you or both, state all." These questions were, after mature deliberation, held by a majority of this court to be leading; and because they were permitted to be propounded to the witness, the judgment of the circuit court was reversed. It is obvious that if these were leading questions, the one under consideration was improper.

The following questions, set out in the second and fourth bills of exceptions, are objected to on the same ground, to wit: 1. "If he (witness) was induced to leave Alabama and go to Mississippi by reason of a letter received from Decatur Whitley;" 2. "Did you carry property from Bunch's Bend in Issaquena county, as the property of Decatur Whitley, deceased?" The answers to these questions are set out in the bills of exception, and were objected to as illegal and incompetent testimony.

It is obvious that the latter question was illegal. No direct evidence had been adduced to prove that a homicide had been committed upon the person of Decatur Whitley, or that the killing occurred within the county of Issaquena. If the prosecution failed to establish either of these facts, the acquittal of the prisoner would necessarily ensue. It was therefore indispensable to prove, not only that Whitley was dead, but that he had been killed in the county of Issaquena. If it could be proved that Whitley had been murdered, and that about the alleged time of the murder he was in the county of Issaquena, the jury might infer that the deed was there perpetrated. If the fact that the witness had carried property, as the property of the deceased, from that place to Alabama, conduced to prove that he was at the time alleged in that county, the question was clearly leading; and it was particularly objectionable because it assumed a fact not proved, that is, the death of Whitley.

Another and a more serious objection to the first and last questions which we have been considering arises when they are looked at in a different point of view. The matter intended to be extracted by these questions was irrelevant, and therefore incompetent evidence in the cause. By the first question the witness is asked if he had ever received a letter purporting to be from Decatur Whitley; if so, at what place was it dated, and where postmarked? Supposing the witness to state, as in fact he did, that he had received a letter purporting to be from Whitley, and that it was dated at the place and near the time when the alleged homicide occurred, it will certainly not be contended that such an answer was competent evidence. If it were admitted to have been competent to give parol evidence of the contents of the letter without first proving that it was in the handwriting of Whitley, or accounting for its non-production, the answer of the witness would not ascend upon the roll of testimony even to the dignity of hearsay evidence. But let it be assumed that the letter was proved to be in the handwriting of Whitley, and that it was dated from the island of Bunch's Bend Cut-off. Upon such admission a fact would be established from which the jury might legitimately have drawn the conclusion that the letter was in point of fact written by Whitley whilst upon the island; but it could certainly not warrant the presumption that he was there at any other point of time, and more especially at the date of the alleged murder. If the fact had been conclusively proved by direct evidence that Whitley was within some short time before the alleged homicide upon

the island, the presumption might have been feebly indulged that he remained there until its occurrence. But to make the answer of the witness, assuming that the letter was in the handwriting of Whitley, conduce to prove the question at issue, it would be essential to base the latter presumption, that is, that Whitley was in fact upon the island at the time when the alleged homicide was committed, upon the presumption that he was upon the island at the date of the letter, inferred from the fact that the witness had received a letter in the handwriting of Whitley bearing date at the island. This would certainly be extending the doctrine of presumptions beyond the limits recognized by either reason or authority.

The same observations are applicable to some extent to the last question and answer. The fact that the witness had carried property from Bunch's Bend, in Issaquena county, to Alabama, as the property of Decatur Whitley, deceased, might constitute the basis of a presumption that the property so transported was in truth the property of the deceased, but it could not warrant the inference that Whitley ever was in that county, not having been otherwise proved to have been there, much less could it upon any principle of law or logic sustain the conclusion that he was there at the date of the alleged murder.

The questions which come next in order arise upon the exceptions taken to the charges of the court.

On the part of the defense, the court was requested to instruct the jury as follows, to wit: 1. "Although the jury may believe from the evidence in the cause that the prisoner confessed to the negro King that he had killed Decatur Whitley, yet if that confession is unsupported by other proof that said Whitley was killed, they must find the prisoner not guilty." 2. "That the best evidence that Decatur Whitley was killed is the testimony of some one who saw him when killed, or who has seen his dead body; and unless the jury believe from the testimony in the case that some one who has testified before them saw Whitley killed, or his dead body, they will find the defendant not guilty." These instructions were disallowed by the court.

The court was further requested to instruct the jury: 1. "That if they believe from the evidence that the prisoner made any confessions or admissions of guilt, such confessions or admissions are to be received by them with great caution, and unless supported by other proof in the cause are not sufficient to convict." This charge the court refused to give, but gave the following as a modification of it, to wit: "That if the jury

believe from the evidence that the prisoner made any confessions or admissions of guilt, such confessions or admissions are to be received by them with great caution, and unless fully believed by the jury are not sufficient to convict." 2. "That before the jury can convict the defendant it must be proved conclusively that Decatur Whitley was killed, and that the extrajudicial confessions or admissions of defendant that he killed him, unless supported by other proofs in the cause, are not sufficient to convict." This instruction the court also refused to give, but gave the following as a modification thereof, to wit: "That before the jury can convict, it must be proved conclusively that Decatur Whitley was killed, and that the extrajudicial confessions or admissions of defendant that he killed him ought to be weighed by the jury with great caution, and unless sufficient to satisfy them that Whitley was killed, and by defendant, they ought to acquit."

Without pausing to consider the minor objections which were urged against these instructions, we will at once proceed to the examination of the main question which they present; that is, whether the extrajudicial confessions of a prisoner charged with a capital felony is sufficient, without any proof whatever, independent of the confession of the *corpus delicti*, to authorize a verdict of guilty.

It is well settled by the law of England that a voluntary and unsuspected confession of guilt, whether made in the course of conversation with private individuals or under examination before a magistrate, is clearly sufficient to warrant a conviction wherever there is independent proof of the *corpus delicti*: Wills on Circum. Ev. 61. According to some elementary writers, confession alone is sufficient to warrant conviction without any such evidence. By Russell, in his treatise on crimes, it is said that such confessions are admissible in evidence as the highest and most satisfactory proof, because it is fairly to be presumed that no man would make such a confession against himself if the facts confessed are not true. And that the first authorities have now established that a confession, if duly made and satisfactorily proved, is sufficient alone, without any corroborating evidence *aliunde*, to warrant a conviction: 2 Russ. on Cr. 824. The text in Roscoe's work on criminal evidence is to the same effect: Rosc. Cr. Ev. 28. Foster and Blackstone maintained a different opinion; the latter holding that confessions, even in cases of felony at common law, were the weakest and most suspicious of all testimony, very liable to be obtained by artifice, false hopes,

promises of favor, or menaces, seldom remembered accurately, or reported with precision, and incapable, in their nature, of being disproved by other negative testimony: 4 Bla. Com. 357.

The cases cited in support of the text in Roscoe and Russell are *Rex v. Wheeling*, 1 Leach, 311; *Rex v. Eldridge*, Russ. & Ry. 440; *Rex v. Falkner*, Id. 481; *Rex v. White*, Id. 508; and the case *Rex v. Tippet*, Id. 509. Upon examination, it will be found that in each of these cases, with the exception of that of *Wheeling*, there was, independent of the confession, some corroborating circumstance which tended to prove the commission of a felony: Russ. on Cr. 834, note *b*; 1 Greenl. Ev. 279, note. In reference to *Rex v. Wheeling*, *supra*, it is observed in Greenleaf's Evidence that "it is too briefly reported to be relied on." The whole statement of that case is that "it was determined that a prisoner may be convicted on his own confession, when proved by legal testimony, although it is totally uncorroborated by any other evidence." It is manifest that this statement may mean that where the commission of a felony is proved by evidence *aliunde* a prisoner may be convicted on his confession, notwithstanding there be nothing to corroborate his confession as to his agency in the commission of the felony. It does not therefore appear that it has ever been expressly decided that the naked confession of a prisoner alone, and without any other evidence, is sufficient to authorize a jury to convict.

In the valuable treatise on circumstantial evidence, the author, commenting on this subject, and referring to the cases cited by Russell and Roscoe, observes that, "according to some authorities, confession alone is a sufficient ground for conviction, even in the absence of any such independent evidence (that is, evidence tending to establish the *corpus delicti*); but the contrary opinion is most in accordance with the general principles of reason, justice, and humanity, the opinion of the best writers on criminal jurisprudence, and the practice of other enlightened nations. Nor are the cases adduced in support of the doctrine in question very decisive, since in all of them there appears to have been some evidence, though slight, of confirmatory circumstances independently of the confession."

In the United States the very few adjudicated cases on the question under consideration are not harmonious. In the state of North Carolina, *State v. Cowan*, 7 Ired. L. 239, it was decided that a prisoner may be convicted on his own unbiased confession, without corroborative evidence establishing the commission of a felony. The supreme court of the state of

New Jersey appears to have adopted the contrary doctrine, and to have held that the naked confession of the prisoner was not sufficient to justify a verdict of guilty: *State v. Aaron*, 1 South. 231 [7 Am. Dec. 592]; *State v. Guild*, 5 Halst. 163 [18 Am. Dec. 404].

This question is one of first impression in this court, and its importance has induced us to bestow upon it the greatest deliberation which circumstances would permit. We believe that the doctrine which holds that in capital felonies the prisoner's confession, when the *corpus delicti* is not proved by independent testimony, is insufficient for his conviction, best accords with the solid principles of reason and the caution which should be applied in the admission and estimate of this species of evidence. We hold, therefore, that the court erred in refusing to instruct the jury that the extrajudicial confession of a prisoner, without proof *aliunde* of the commission of a felony and of the death of the party, was insufficient to warrant his conviction.

As we reverse the judgment for the errors already noticed, it will be unnecessary to examine the remaining exceptions.

LEADING QUESTION DEFINED AND DISCUSSED: See *Turney v. State*, 47 Am. Dec. 74, and note 82, where the subject is treated at length.

IN HOMICIDE, CORPUS DELICTI MUST BE PROVED beyond a reasonable doubt: *Commonwealth v. York*, 43 Am. Dec. 373.

THE PRINCIPAL CASE WAS FOLLOWED AS AUTHORITY in *Pitts v. State*, 43 Miss. 482, to the point that extrajudicial confessions, uncorroborated by other proof of the *corpus delicti*, are of themselves insufficient to warrant a conviction.

GELSTROP v. MOORE.

[26 MISSISSIPPI, 206.]

ORDER FOR SALE OF REAL ESTATE BY EXECUTOR IS INVALID unless the directions of the statute have been strictly complied with, and such compliance must be shown by the record.

SALE BY EXECUTOR OR ADMINISTRATOR MUST BE MADE ACCORDING TO LAW, when made in pursuance of decedent's will.

STATEMENT THAT EXECUTOR'S SALE WAS REGULARLY MADE will not be more than *prima facie* evidence of its legality, the acts of the executor in executing an order of sale being a matter *in pais*.

SALE OF PERSONALTY BY EXECUTOR will not be invalid if the order of confirmation should not show that the requisite notice had been given, or that the sale was made in the manner prescribed by law.

WHERE RECORD IS SILENT AS TO NOTICE OR MANNER OF SALE, it is competent to introduce parol testimony to prove the manner of sale.

APPEAL from the circuit court of Itawamba county. William H. Moore *et al.*, executors of John Walker, deceased, plaintiffs; James C. Gelstrop and Uriah Nanny, defendants. Action to recover on a promissory note made by defendants. Plaintiffs obtained a verdict, and defendants appealed, assigning the reasons stated in the opinion.

Robins and Owen, for the plaintiffs and appellees.

Bullard and Beene, for the defendants and appellants.

By Court, SMITH, C. J. This was a suit brought in the circuit court of Itawamba to recover the contents of a bill single, made to secure the purchase money of certain slaves sold by the defendants in error in their character of executors. A verdict and judgment were rendered for the plaintiffs. The cause hence comes into this court.

The facts of the case are contained in a bill of exceptions, from which it appears that the testator of the plaintiffs, after making by his will specific disposition of certain portions of his estate, directed that his crop of cotton, all of his negroes not previously disposed of, together with the residue of his estate, should be sold by his executors at public auction to the highest bidder. Under that provision of the will, the negroes, which were the consideration of the instrument sued on, were sold to the defendants. An account of the sale was returned into the probate court, approved, and ordered to be filed and recorded. The order of the probate court is entered in the following words, to wit: "This day W. H. Moore, one of the executors of the last will of John Walker, deceased, presented in open court the sale-bill, which is examined, allowed, and ordered to be filed and recorded." It was admitted the record of the court of probates contains no evidence that notice was given according to law of the time and place of sale. It was further admitted on the trial that due proof was made of notice, if parol evidence was admissible to prove it.

As the entry above quoted was the only part of the record in regard to the sale offered in evidence, no question can be raised as to the fact whether an order for the sale of the property had been made. We must presume that the proper order was made, in the absence of evidence to the contrary. For he who attacks the title of his adversary on the ground of its illegality must show wherein the illegality consists. The questions then submitted to us are, whether the record must show affirmatively that notice was given as required by statute, and

if not, whether the fact of legal notice, the record being silent on the subject, can be proved by parol evidence. For if it is not necessary that the record should show affirmatively that due notice was given, and that the notice required by statute could be proved by the introduction of parol evidence upon the agreed facts, there is no pretense for saying that the consideration of the instrument sued on had failed.

It is essential to the validity of a sale of either real or personal property, by an executor or administrator, that it should be made pursuant to a valid order or decree of the court of probates, unless where by statute it is otherwise provided or directed in the will of the testator: Hutch. Code, 659, sec. 109. And it is the settled doctrine of this court that an order or decree for the sale of real estate by an executor or administrator is invalid unless the directions of the statute have been strictly complied with, and that such compliance must be shown affirmatively by the record: *Gwin v. McCarroll*, 1 Smed. & M. 351; *Smith v. Denson*, 2 Id. 326; *Worten v. Howard*, Id. 527 [41 Am. Dec. 607]; *Laughman v. Thompson*, 6 Id. 259. The same rule is perhaps not generally applicable to orders for the sale of the personal estate; but the question does not arise in the case before us, as it is presumed there was an order for the sale of the personal property not disposed of by the will, regularly made. The sale itself, however, must be made according to the directions of the law, otherwise it will be invalid. But as the acts of the executor or administrator in the execution of the order of sale are matters *in pais*, it would seem that unless proof of the fact is made and entered of record a statement that the sale was regularly made will not be more than *prima facie* evidence of its legality. On the other hand, it is settled that a sale will not be invalid if the order of confirmation should not show that the requisite notice had been given, or that the sale was made in the manner prescribed by law: *Worten v. Howard* and *Smith v. Denson*, *supra*.

If, where the record is silent as to the notice or manner of the sale, it is competent to introduce parol evidence to prove that the sale was made contrary to law, it would follow, necessarily, that in such a case it is proper to allow parol evidence to be introduced to prove its regularity. The case of *Worten v. Howard*, above cited, is an authority on this point. In that case, which was an action of detinue for a slave by a party claiming as legatee under the will, the defendant, who claimed title by virtue of a sale made by the executor, was permitted to read the

return of sales. The return did not show upon its face that the sale was made according to the statute. The plaintiff then offered parol evidence to prove that the sale was a private one. That evidence was rejected, and its rejection was held error by this court.

Hence, in this case, although it was unnecessary to introduce parol evidence to prove that due notice was given of the time and place of sale, its introduction was not an error of which the party could complain.

But there is an error for which the judgment must be reversed, the cause remanded, and a new trial awarded in the circuit court. The jury erred in the calculation of the interest due upon the bill single. They have allowed interest by way of damages to the amount of one hundred and forty-three dollars and sixty-six cents, whereas plaintiffs were entitled to but sixty-five dollars and thirty cents, as it is shown by a calculation made under a rule of court.

SALE BY EXECUTOR OR ADMINISTRATOR must be made in conformity with the statute: *Bond v. Zeigler*, 44 Am. Dec. 658; *Worten v. Howard*, 41 Id. 607.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW the manner in which an executor's sale was conducted, where his return does not show the same: *Worten v. Howard*, 41 Am. Dec. 607.

THE PRINCIPAL CASE WAS FOLLOWED AS AUTHORITY in *Martin v. Williams*, 42 Miss. 210.

CURTIS v. BLAIR.

[28 MISSISSIPPI, 309.]

WHERE A. APPLIED TO B., AGENT OF C., relative to the purchase of certain land, and B. wrote to A., informing him that he could have the land provided he closed the trade within two weeks of the date of writing, setting forth at the time the terms of sale and a description of the property *held*, that the moment that the terms were accepted, the mutuality necessary to a complete contract was created.

APPOINTMENT OF AGENT TO MAKE NOTE OR MEMORANDUM IN WRITING need not be in writing. It is sufficient if the contract be in writing and the agent authorized to act as such.

WHERE TIME IS ESSENCE OF CONTRACT, and one of the parties is not ready and able to perform his part of the agreement on the day fixed, the adverse party may elect to consider it at an end.

WHERE CONTRACT MUST BE PERFORMED WITHIN SPECIFIED TIME, the party bound has until the last moment of the last day to discharge himself, but the offer to perform must be made at a proper place and within a reasonable time, so that the interests of the adverse party may not be affected injuriously.

APPEAL from the northern district chancery court at Holly Springs. A. C. Blair, plaintiff; Henry T. Curtis, G. W. J. Crawford, and — Ayres, defendants. Action brought to compel a specific performance of a contract. A decree was made in favor of the plaintiff, and defendants appealed. The facts are stated in the opinion.

Watson and Craft, for the plaintiff and appellee.

Word, Freeman, Stearns, Harris, and Glenn, for the defendants and appellants.

By Court, HANDY, J. The appellee filed this bill in the district chancery court at Holly Springs, for the specific performance of a contract for the sale of a tract of land, under the following state of facts:

On the twenty-second of August, 1850, one Pinson, as agent for the appellant Curtis, addressed a letter to Blair, the appellee, stating in substance that their friend White had called upon Pinson to purchase a tract of land for Blair, which Pinson understood to be the land in controversy in this case, though White did not know the members of it; that he could not make the sale because negotiations were then in progress between him and one Jones and Crawford for the purchase of the land, but that it was probable they would not be able to comply with the terms, and that Blair might still be able to secure it, and to do so before the other parties, and expressing a desire that Blair should be the purchaser. This letter stated the price and terms at which the land was offered for sale. Shortly after this, Pinson addressed Blair the following letter:

“PONTOTOC, August 26, 1852.

“A. C. BLAIR, esq.

“Sir: Within the last half hour I have sold the north half of section 24, township 2, range 1 east, to James W. Merritt. Since then I have received yours of the twenty-fourth, and hasten to reply that the south half can be had for nine hundred and twenty dollars, the market price, one fourth cash, balance at one, two, and three years, with interest from date. I can't divide it; would be glad to sell it soon to you, or any good man.

“Mr. White did succeed in getting section 29, township 2, range 1 east [the land involved in this suit], provided you come to close the trade within two weeks from the twenty-fourth, on the terms mentioned in my letter by Mr. White. The land is too much in demand to wait long before it is closed.

“Yours truly, JOEL PINSON.”

Pinson was acting as the agent for Curtis, the owner of the land, under authority derived from another agent of Curtis, and Curtis sufficiently admits his agency in his answer to the bill. Blair resided in Tippah county, and on the sixth of September, 1850, in consequence of the last letter of Pinson, he employed one Herring, as his agent, to go to Pontotoc, and take the sum which was to be paid in cash for the land to Pinson. This agent called upon Pinson at his place of abode, which was about half a mile from his office, his known place of business, where his books and papers were kept, and where all matters connected with his land agency were transacted. It was then, according to Blair's witness, fifteen or twenty minutes after eleven o'clock, and according to another witness it was fifteen or twenty minutes before twelve o'clock, and Saturday night. Pinson had retired to bed and was asleep. Herring aroused the family and sent information to Pinson that he had come to pay the money on the purchase of the land for Blair; but Pinson declined taking any further step in the business, complaining that Blair had not come sooner, and intimating that he had not complied with the contract. When again applied to by Herring on the following Monday, he declined to carry out the contract. Herring did not bring the notes for the credit portion of the purchase money, and was not authorized by Blair to execute them. The land was afterwards purchased of Pinson by the appellants, Crawford and Ayres, who were informed by Pinson that the contract with Blair was at an end, and who thereupon paid part of the purchase money in cash, and executed their notes for the residue, taking a bond for title.

The vice-chancellor decreed that the sale to Crawford and Ayres be canceled, and that the contract of sale to Blair be specifically executed.

In the consideration of this case, several points of an incidental character have been discussed, which we deem it proper to dispose of before we proceed to consider the main questions upon which the propriety of the decree below depends.

First, it is contended, in behalf of the appellants, that the facts of the case show no valid contract; that the agreement was verbal, and not binding under the statute of frauds; that the letters of Pinson do not satisfy the statute, because they were mere propositions to sell the land. It is true that when the letters were written they were but propositions to sell. They contained, however, a description of the property and the terms on which it was proposed to be sold, and every requisite of cer-

tainty and identity without resort to other proof. It bound the party "to be charged therewith," by whom or in whose behalf it was made, according to its terms; and the moment it was accepted and the terms complied with by the other party, if that were done, the transaction became mutual as to all rights and liabilities resulting from it. The acceptance, if duly made, created the mutuality necessary to a complete contract: *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Carr v. Duval*, 14 Pet. 77; *Mactier v. Frith*, 6 Wend. 103 [21 Am. Dec. 262].

Secondly, it is said that the letters are signed by Pinson in his own right, and not as agent for Curtis, and that it is incompetent to show *aliunde*, and especially by parol evidence, that he was acting as agent. The statute does not require that the appointment of the agent to make the "note or memorandum in writing," should be in writing, nor does it require that the signature should be in the name of the principal. It is well settled that the statute is satisfied if the contracts be in writing and signed by the agent authorized to act therein: *Yerby v. Grigsby*, 9 Leigh, 387; *Jones v. Littledale*, 6 Ad. & El. 486; S. C., 33 Eng. Com. L. 265; Story on Agency, sec. 270.

In this case, though the strictly formal authority of Pinson is disproved by his own testimony, yet he shows that he was acting as agent under an informal authority, and the answer of Curtis sufficiently admits that he was acting as his agent.

Again: it is contended that the contract arising from the letters was without consideration, because there was nothing obligatory on Blair at the time the letters were written. By reference to the last letter, it will be seen that the purchase had already been made by White for Blair, "provided he should come to close the trade within two weeks," on the terms stated in the previous letter. The consideration, then, moving to Curtis, was the benefit to be derived from the subsequent completion of the contract on the part of Blair. If the agreement had not been complied with by Blair, the matter would have been a simple proposition unaccepted. But the benefit in contemplation to Curtis was the purchase money for the land, and in consideration that Blair would pay that, or agree to pay it within the time stipulated, he agreed to sell the land. When Blair accepted the terms, and complied or offered to comply with them according to the stipulations, the anticipated benefit was realized to Curtis, and the contract complete on both sides.

Considering this, then, a sufficient agreement to charge Curtis under the statute of frauds, let us inquire, first, whether its

terms were sufficiently complied with on the part of Blair to entitle him to the benefit of it against Curtis; and second, whether under the circumstances he should have a specific enforcement of it against the rights of Crawford and Ayres.

1. First, did Blair sufficiently comply with the agreement in point of time? By its terms he was entitled to the benefit of it "provided he came to close the trade within two weeks from the twenty-fourth" of August, on the terms previously mentioned. The computation of the time, under this phraseology, must commence on the twenty-fifth of August, excluding the twenty-fourth: *Pugh v. Leeds*, 2 Cowp. 714; *Bigelow v. Willson*, 1 Pick. 485; *Homan v. Liswell*, 6 Cow. 659; Ch. Bills, 404. So that the two weeks would transpire with the seventh of September. It appears that Blair's agent called on Pinson between the hours of eleven and twelve o'clock at night on that day, at his residence half a mile from his known place of business where his books and papers pertaining to land matters were, and where he would have had to go to transact this business properly. He had retired to rest and was asleep, and it appears that he could not have got up and dressed himself and gone to his office and completed the business before the hour of twelve o'clock.

It has been held that where a party is bound to perform his contract within a stipulated time he has until the last moment of the last day to discharge himself. But it is also well settled that he must perform it within a reasonable time, which is to be regulated by all the circumstances of the case: *Cocker v. Franklin Hemp and Flax Mfg. Co.*, 3 Sumn. 530. The offer of performance, though within the time limited, if it be near its termination, is required to be made at a proper place, and within sufficient time to allow the adverse party to protect his interest and act with due caution and consideration in the completion of the contract. The soundness of this rule is very ably illustrated in the cases of *Startup v. Macdonald*, 46 Eng. Com. L. 591; *Wing v. Davis*, 7 Greenl. 35.

Time is of the essence of the contract, and if the one party is not ready and able to perform his part of the agreement on the day fixed for the performance, the adverse party may elect to consider it at an end: *Bank of Columbia v. Hagner*, 1 Pet. 455; *Iiddell v. Sims*, 9 Smed. & M. 612; *Stockton v. George*, 7 How. (Miss.) 172.

Applying these principles to the circumstances of this case, we can not think that the application to Pinson was made within the time required by law. In the short space of about forty

minutes at the most, he would have been compelled to leave his bed and go half a mile to his office, receive money, and perhaps draw notes and execute a title bond for the land. He states that he could not have transacted the business without going to his office. Herring did not see him in person, but he was well justified in believing that the whole business would have to be completed; and if so, it could not have been settled without encroaching upon the sabbath day.

But it is said that Blair was only bound by the terms of the agreement "to come to close the trade" within the time mentioned; that is to say, he was only required to make known that he accepted the terms. We can not take this view of it. It appears by the letter that the terms had already been accepted by White, the agent of Blair, and all else that was required was to "close the trade." This was to be done by paying the money in cash in part, and executing his notes for the residue, and receiving a title bond. Under these circumstances, the expression "come to close the trade" could only mean "come and close the trade." This is clearly the true intent of the letter, and it is manifest that it was so regarded by Blair, for he undertook to send Herring to pay the money within the time stipulated.

Secondly, did Blair comply with his contract in substance, or did he offer to do so, within the time limited? It appears by the letters that the terms of sale were to be one fourth of the purchase money in cash, and the balance on credit of one, two, and three years. It is plain from this that it was contemplated that notes should be executed for the purchase money, and both parties seem so to have regarded it. Yet Herring did not bring or tender to Pinson, or offer to execute, nor was he authorized to execute, any notes for the credit portion of the purchase money, so that a most material part of the business of "closing the trade" was wholly neglected.

Again: it appears from the pleadings and proofs in this case that the ground of controversy is the mere pecuniary value of the lands in dispute. Both parties are contending for them, because they were worth more in the market than was proposed to be paid for them by Blair. The damages, therefore, for a breach of the contract, to be recovered in an action at law, would afford an ample redress; and courts of equity in such cases will not interfere except under special circumstances: 1 Sugd. Vend. 202; *Hepburn v. Dunlop*, 1 Wheat. 197; *Hepburn v. Auld*, 5 Cranch, 262; *Hatch v. Cobb*, 4 Johns. Ch. 559;

Kempshall v. Stone, 5 Id. 193. In *Hester v. Hooker*, 7 Smed. & M. 778, it is said by this court, in speaking of bills of this character, that "no certain, definite rule can be laid down which would determine when a party was or was not entitled to such relief. Cases are numerous where both bill and cross-bill have been dismissed, and the parties respectively left to their remedies at law. Where the complainant has not done all that he stipulated to do, or has not placed himself in a situation to be ready to do so, upon compliance on the other side, the court will not interpose in his behalf."

Under these views, we do not think that Blair was entitled to a specific performance of the agreement from Curtis.

2. With much greater reason is he not entitled to have the sale to Crawford and Ayres vacated. They purchased the land from Pinson after the failure of Blair to perfect the sale. They had previously been informed of Blair's negotiation for the land by Pinson, and evinced anything else but a disposition to interfere with it. They were, however, afterwards informed by Pinson that Blair had failed to complete the purchase, and, acting in faith of that assurance, they became the purchasers. If it be said that they had notice from Pinson of Blair's negotiation or purchase, or sufficient to put them on inquiry, and ought, by reason of that information, to have satisfied themselves that Blair had no right to the land, they also had notice from the same source that Blair's purchase had failed. They were as well justified in acting on the latter information as on the former; and under the circumstances, they were not required to seek further information than that last derived from Pinson: See 2 Lead. Cas. in Eq., pt. 1, p. 104. It would not, therefore, be equitable to cancel the purchase which they have *bona fide* made; and a due regard for their equities would incline us to remit Blair to his remedy at law, if he has any, for the alleged breach of contract on the part of Curtis, rather than to compel a specific performance against Curtis, and deprive Crawford and Ayres of the benefits of their purchase.

The decree of the vice-chancellor is reversed, and the bill dismissed.

TIME IS ESSENTIAL PART OF CONTRACT, and a failure to perform at a stipulated time forfeits the rights existing under the same, when: *Wells v. Smith*, 31 Am. Dec. 274, and note; *Shinn v. Roberts*, 43 Id. 636.

AUTHORITY OF AGENT TO EXECUTE SEALED INSTRUMENT: See *Paine v. Tucker*. 38 Am. Dec. 255, and note.

McCoy v. McKowen.

[26 MISSISSIPPI, 487.]

PRINCIPAL IS NOT LIABLE FOR AGENT'S ACTS, WHERE LATTER EXCEEDS HIS AUTHORITY and the acts are unsanctioned.

EVIDENCE OF WILLFUL TRESPASS BY SERVANT will not render the master liable as a trespasser, without express evidence that the latter authorized the act.

AUTHORITY TO COMMIT TRESPASS CAN NOT BE IMPLIED.

TRESPASS *vi et armis*. Appeal from the circuit court of Amite county. Alexander McKowen, administrator, plaintiff; Elijah L. McCoy, defendant. Action trespass *vi et armis* for beating a female slave hired from McKowen, from the effects of which beating she died. Suit was dismissed as to Haygood, one of the defendants, and judgment rendered against McCoy, whereupon the latter appealed. The facts are stated in the opinion.

D. Mayes, for the plaintiff and appellee.

H. F. Simrall, for the defendant and appellant.

By Court, HANDY, J. This was an action of trespass *vi et armis*, brought by the defendant in error against one Haygood and the plaintiff in error, for beating a female slave hired of the defendant in error, to whom she belonged, by the plaintiff in error, from the effect of which she died.

It appears by the record that the facts of the case are in substance as follows: That McCoy had ordered the slave on the night before the occurrence to get an early breakfast the next morning; but she not having arisen in due time, he directed Haygood, his overseer, to go into the kitchen and arouse her. Soon after he went into the kitchen a noise was heard, as of a difficulty between the overseer and the slave. It was between four and six o'clock in the morning. McCoy got up and went out into his gallery, when the woman ran to him for protection. He told her she must submit, which she did; and by his direction the overseer whipped her with the lash of a whip, in a manner not cruel or unusual, or calculated to injure her seriously. After the whipping, she walked to the kitchen, a short distance off, was seen to stumble once, but walked very well. Before coming out of the kitchen she had resisted the overseer. About eight o'clock of the same day she died. She had two wounds upon her head, one over the eye, and the other behind the ear, which might have been produced by a fall against an oven or something of that kind in the kitchen, but were most

probably inflicted by the overseer in the kitchen. On *post-mortem* examination, they appeared to be contused wounds made by a blunt instrument, and might have produced death. The skull was not fractured, but the blood-vessels of the brain were engorged with blood. The physician proved that the woman was of a habit predisposed to apoplexy, and that violent passion and exertion in such persons sometimes produces apoplexy. It appears that the wounds on the head were not inflicted during the whipping ordered by McCoy, or by his direction.

The suit was dismissed as to the overseer, and a verdict and judgment were rendered for the plaintiff below; upon which the defendant McCoy moved to set aside the verdict as contrary to the evidence, and for a new trial; which motion was overruled, and the case is thereupon brought here.

It does not clearly appear to what cause the death of the slave is to be attributed, but it could not have been caused by the whipping which McCoy ordered. It might have been caused either by the wounds on her head or by apoplexy, under the opinion of the physician. But that matter is settled by the verdict of the jury, who must have concluded that the wounds on the head were the cause of the death, and that they were inflicted by the overseer while in the kitchen; and this must be taken as established. There is no evidence whatever to show that these wounds were inflicted by the direction or sanction of McCoy, or that he expected any difficulty or necessity for violent measures when the overseer was sent by him to arouse the slave. For all that appears, the violence of the overseer was entirely unauthorized by McCoy, and the result of the overseer's imprudence. Nor does it appear that McCoy was apprised of the wounds on the head when the woman came to him for protection. The jury must have thought the beating, by the wounds on the head, unnecessary in the exercise of the overseer's rightful authority; for if it had been necessary, as in self-defense from the violence of the woman, his conduct would have been justifiable. Their conclusion, then, must have been that the beating was unnecessary, willful, and malicious. The question then arises, Was the employer liable for such conduct?

This point was much considered in the leading case of *McManus v. Crickett*, 1 East, 106; and Lord Kenyon, after advert-
ing to the authorities upon the subject, concludes "that when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the

authority given him, and his master will not be answerable for such act." Judge Story states the rule thus: "The principal is not liable for the torts or negligences of his agent in matters beyond his agency, unless he has expressly authorized them to be done, or he has subsequently adopted them for his own use or benefit. Hence it is that the principal is never liable for the unauthorized, willful, or malicious act or trespass of his agent:" Story on Agency, sec. 456. It is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned by him. These principles have been sanctioned in the case of *Harris v. Nicholas*, 5 Munf. 483, which was a case presenting a state of facts similar in effect to this. The court held that the defendant was not liable, because the act of the agent was "neither authorized by the defendant nor committed in the usual and proper course of his duty as agent, but was a willful and unauthorized trespass." And the rule is laid down in still stronger terms in 2 Stark. Ev. 34, thus: "Evidence of a willful trespass by the servant will not show that the master is a trespasser, without express evidence that the act was done by his sanction; for an authority to commit a trespass can not be implied." We do not say that the sanction of the employer may not be shown by circumstances from which it may be inferred; but no such circumstances appear here.

Upon these principles, there was no evidence to justify this verdict; and reluctant as we are to disturb the verdict of a jury upon the ground of an erroneous view of the evidence, it becomes our duty to do so when it appears that in no proper view of the evidence can the law support the verdict.

The judgment is reversed, and the case remanded for a new trial.

LIABILITY OF MASTER FOR ACT OF SERVANT.—This question will be found fully discussed in the extensive note to *Ware v. B. & L. Canal Co.*, 35 Am. Dec. 192. As to liability for servant's tortious or criminal acts, see also the case of *Commonwealth v. Nichols*, 43 Id. 432.

THE PRINCIPAL CASE WAS FOLLOWED AS AUTHORITY in *N. O. J. & G. N. R. R. Co. v. Harrison*, 48 Miss. 125, and distinguished in *N. O. J. & G. N. R. R. Co. v. Allbritton*, 38 Id. 251.

DAVIS v. LEE.

[26 MISSISSIPPI, 505.]

PARTY SIGNING HIS NAME TO BLANK BILL OR NOTE, either as drawer, maker, or indorser, and delivering it to another, thereby gives that person authority to fill it up in any manner he pleases, not inconsistent with the character of such paper, and is liable to a party taking it without notice.

PARTY WHO SIGNS BLANK PAPER MAKES HOLDER HIS AGENT, as the blank signature operates as a general letter of credit, which authorizes the party to whom it was intrusted to fill it up as he chose.

WHERE LOSS OCCURS TO HOLDER OF BLANK PAPER without notice, the principle that where one of two innocent parties must suffer, he who has been the cause of the loss must bear it, applies.

APPEAL from the circuit court of Wilkinson county. George Lee, plaintiff; Fielding Davis, defendant. *Assumpsit* on promissory note. Lee obtained a judgment, and Davis appealed. The facts are stated in the opinion.

H. F. Simrall, for the plaintiff and appellee.

Potter and Boyd, and Gordon and Posey, for the defendant and appellant.

By Court, **HANDY, J.** This was an action of *assumpsit* brought by the defendant in error against the plaintiff in error, as the indorser of a promissory note, under the following state of facts: T. O. Starke, being the holder of a note of the same amount and maturity as the note sued on, made by Smith, and payable to and indorsed by Davis, offered it to Lee in a settlement between them. Lee agreed to receive the note, but requested that it might be so changed as to be made payable in the city of New Orleans. Starke forwarded the note to Smith, for the purpose of having it so changed or another to be made of the same tenor, except as to the place of payment. Smith returned the note sued on, signed by Smith as maker, but Starke being the payee instead of Davis, and Davis's name written across the back as indorser, payable in New Orleans, and in all other respects like the original note. In this condition, Starke offered the note to Lee, and told him that Davis was the first indorser on the original note, and it was intended that he should continue to be such, and that the note was intended to be taken without liability on Starke's part; and thereupon, at the time the note sued on was transferred to Lee, it being then payable to Starke as payee, and indorsed in blank by Davis, Starke indorsed his name over that of Davis, thus: "Without recourse

on me, T. O. Starke;" and thus it was handed to Lee. It was proved further, in behalf of Davis, that he indorsed the note solely for Smith's accommodation, and that it was expressly understood at the time between Smith and Davis that it should be indorsed by Starke, to whom it was made payable, so that Davis should be protected by the prior indorsement of Starke; that Starke was not present at the time, and the note sued on was transmitted by Smith to him at New Orleans.

The verdict and judgment being for the plaintiff below, the defendant has brought the case to this court by writ of error.

The rights of the parties in this case depend upon this question: In the condition in which this note was at the time it was offered by Starke to Lee, was Lee justifiable in taking such an indorsement of it by Starke, as that Davis would not be protected by the prior indorsement of Starke, and was Lee bound to inquire as to the condition upon which Davis became indorser?

It is now too well settled to admit of question, that a party signing his name to a blank bill or note, either as drawer, maker, or indorser, and delivering it to another, thereby gives that person authority to fill it up in any manner he pleases, not inconsistent with the character of such paper as the writing imports; and that a party taking it without notice will be protected. This rule has been held in a variety of cases; sometimes where the paper was in blank as to date or amount or time of payment, and sometimes where the name was written on paper entirely blank: *Russel v. Langstaffe*, 2 Dougl. 514; *Violett v. Patton*, 5 Cranch, 142; *Cruchley v. Clarence*, 2 Mau. & Sel. 90; *Mitchell v. Culver*, 7 Cow. 337; *Dean v. Hall*, 17 Wend. 214; *Johnson v. Blasdale*, 1 Smed. & M. 20 [40 Am. Dec. 85]; *Goad v. Hart*, 8 Id. 787; *Putnam v. Sullivan*, 4 Mass. 45 [3 Am. Dec. 206].

The principle running through all the cases is, that where a party signs blank paper he makes the holder his agent, as upon a general letter of credit, to fill up the paper as he thinks proper. If it is signed in blank in any material respect, whether as maker or indorser, it makes no difference. The principle seems to be, that if anything is necessary to be done in order to give validity to the paper, the blank signature carries with it authority to the holder to render it perfect and effectual. If that act can be done in several ways, the blank signature gives to the bearer the authority to use his discretion so far as the rights of parties taking it without notice are concerned; and

if a loss occurs, the familiar principle applies, that where one of two innocent parties must suffer, he who has been the cause of the loss must bear it.

Applying these principles to the present case, we perceive that Starke brought paper to Lee, signed in blank by Davis as indorser. Something was necessary to give effect to Davis' blank indorsement. It must be indorsed by Starke. It must be presumed that Davis intended that to be done. Commercial usage allowed it to be done either generally or specially. Starke stated that he was not to be bound. He held the unlimited power of Davis' blank indorsement in his hands, and Lee was justified in believing that the indorsement was in fact what the law said it was, an unlimited authority to the party to whom it was intrusted by Davis. He was not bound by any private understanding between the parties of which he had not notice; nor was he held to inquiry, but might act upon the presumption that the party signing had given authority to do the act, without which the paper could not have legal effect, and in the manner in which the necessary prior party might choose: Ch. Bills, 33; *Johnson v. Blasdale, supra*.

It is urged by counsel for the plaintiff in error that the paper was not in negotiable form without Starke's prior indorsement; and therefore that Lee must be deemed a holder, with notice of its infirmity. This is a very old objection. It was urged in *Russel v. Langstaffe, supra*, and Lord Mansfield answered it by declaring the principle which lies at the foundation of all such contracts that the blank signature was a general letter of credit, which authorized the party to whom it was intrusted to fill it up as he chose. This case is not so strong as that or the case of *Violett v. Patton, supra*, which were indorsements of paper entirely blank. The difference is simply that between paper entirely blank and partly blank, in both of which the authority to supply material deficiencies is necessarily implied, for otherwise the paper could have no effect.

It is no objection that this note was given in settlement of a pre-existing debt: *Swift v. Tyson*, 16 Pet. 1.

The case of *Jennings v. Thomas*, 13 Smed. & M. 617, has been urged as controlling this case. But we can not see its application. That was a contest between the immediate parties to the transaction, and the question was, What was the understanding between the immediate parties themselves? It was a question between Thomas and Jennings and Drone as to what was their understanding and object when the note was received from

Thomas and when his name was placed upon it. Their rights were governed by what their understanding and design at the time were. But the question here is, not what was the object of Smith and Davis and Starke, but whether Lee, a stranger, who did not participate in it, and is not shown to have known it, is to be charged with their private agreements.

Considering the principles governing this case as well settled by authority in favor of the defendant in error, the judgment is affirmed.

EFFECT OF INDORSEMENT IN BLANK: See *Huie v. Bailey*, 35 Am. Dec. 214; *Weakly v. Bell*, 36 Id. 116; *Tilman v. Ailes*, 43 Id. 520; *Whiton v. Mears*, 45 Id. 233.

RIGHT OF HOLDER OF BLANK PAPER TO FILL UP BLANK: See *Morris v. Foreman*, 1 Am. Dec. 235; *Smith v. Lawrence*, Id. 556; *Ritchie v. Moore*, 7 Id. 68; *Hill v. Martin*, 13 Id. 372; *Lawrence v. Mabry*, 21 Id. 346; *Camden v. McKoy*, 38 Id. 91, and cases cited in the notes to the same.

BUSH v. COOPER.

[26 MISSISSIPPI, 599.]

WHILE IT IS PRIVILEGE OF DEBTOR TO BE PERSONALLY DISCHARGED from a debt, under the national bankrupt act of 1841, yet any security which the creditor might have consisting of a lien on property was left in as full force as though the debtor had never been discharged from his debt for which the security was made.

RULE THAT WHATEVER DISCHARGES DEBT NECESSARILY DISCHARGES DEED IN TRUST, on property executed to secure it, does not apply where an action upon the debt has been barred by the statute of limitations. In such a case, the creditor may proceed to foreclose the mortgage, notwithstanding the bar of the debt by the statute of limitations.

OUTSTANDING TITLES OR INCUMBRANCES PURCHASED IN BY VENDOR OR MORTGAGOR inure to the benefit of the vendee.

TERMS "GRANT, BARGAIN, AND SELL," in a deed, import covenants of general warranty of title against incumbrances and for quiet enjoyment, as effectually as though such covenants had been expressed in the deed.

WHERE GRANTOR EXECUTED DEED FOR REAL ESTATE, and therein covenants that he has the right to convey, that it is free from incumbrances, that he will defend the title, etc., the covenants not being regarded as an obligation to pay the debt: *held*, that the deed was not of a character to render it provable in bankruptcy, and consequently was not affected by the grantor's discharge in bankruptcy.

APPEAL from the superior court of chancery. Harrison Cooper, administrator, plaintiff; David Bush, jun., defendant. Action brought to foreclose a deed of trust. The plaintiff obtained judgment, and defendant appealed. The facts are stated in the opinion.

J. B. Thrasher, for the plaintiff and appellee.

John B. Coleman, for the defendant and appellant.

By Court, **HANDY, J.** This bill was filed by the appellee in the superior court of chancery, to foreclose a deed in trust executed by the appellant on the seventeenth of March, 1840, conveying certain real estate in the town of Port Gibson to trustees, to secure the payment of two promissory notes made by the appellant, and afterwards transferred to the appellee. The facts necessary to be taken into view, in considering the questions presented for determination, are as follows:

The notes secured by the trust deed were due in January and February, 1841; and in November, 1842, a judgment at law was rendered upon them against Bush, which judgment and the deed in trust were afterwards transferred to the appellee, and remain unpaid. The deed, in conveying the property, contains the words "grant, bargain, and sell," but contains no other covenant of warranty in express terms.

The appellant was discharged as a bankrupt in February, 1843; and in October, 1844, he purchased the property embraced in the deed in trust at sheriff's sale, under an execution on a judgment rendered in June, 1838, against the appellant, and which was unsatisfied, for the sum of one thousand and thirty-three dollars, by means acquired by him after his discharge as a bankrupt; and in virtue of that purchase he now claims to hold the property by title paramount to the lien of the deed in trust. On the contrary, the appellee claims that the property is subject to the payment of the debt secured by the deed in trust, notwithstanding the discharge of the appellant as a bankrupt, and that the appellant's purchase, under the prior incumbrance, can not be set up by him to defeat the security of the deed in trust.

The first question to be settled is, whether the discharge of the appellant from the debt, by his certificate as a bankrupt, extinguished the deed in trust.

It is insisted, on his behalf, that the deed was but a mere incident to the debt, and that whatever discharged the debt necessarily destroyed the deed, because the security could not exist where the debt, which was its foundation and support, was discharged. This is undoubtedly well sustained by modern decisions, as a general rule; but it is not without exceptions. It is held to apply in all cases where the debt has been actually paid, or where it was not supported by a valid legal consider-

ation, or where the debtor *ex æquo et bono* is discharged from its payment. But it is held not to apply to a case where an action upon the debt has been barred by the statute of limitations, and that the creditor may proceed to foreclose his mortgage, notwithstanding the bar of the debt by the statute: *Miller v. Helm*, 2 Smed. & M. 697; *Miller v. Trustees of Jefferson College*, 5 Id. 651; *Bank of Metropolis v. Guttschlick*, 14 Pet. 19; *Thayer v. Mann*, 19 Pick. 535.

In addition to this, the objection is fully met by the second section of the bankrupt act of congress of 1841, which provides that "nothing in the act shall be construed to annul, destroy, or impair any lawful rights of married women or minors, or any liens, mortgages, or other securities on property, real or personal," etc. From this it is manifest that while the privilege was granted to the debtor to be personally discharged from the debt, any security which the creditor might have, consisting of a lien on property, was left in as full force as though the debtor had never been discharged from the debt for the security of which the lien was made.

The second question, then, presented is, whether Bush is estopped by the deed from setting up his title acquired under the judgment, which was a lien existing at the date of the deed, in opposition to the title conveyed by the deed. This is a question of great importance in its direct and collateral bearings, and it has been carefully considered by the court.

It is undoubtedly true that a vendor or mortgagor will not be permitted to purchase in or set up outstanding incumbrances in derogation of the title conveyed by his deed, and of the assurances contained in it, and that if he purchases an outstanding title, it inures to the benefit of his vendee: *Hardeman v. Cowen*, 10 Smed. & M. 486; *Champlin v. Dotson*, 13 Id. 553 [53 Am. Dec. 102], and cases there cited. And it is held that under our laws the terms "grant, bargain, and sell," in a deed of conveyance, of themselves import covenants of general warranty of title, and against incumbrances and for quiet enjoyment, as effectually as though such covenants had been expressly contained in the deed: *Weems v. McCaughan*, 7 Smed. & M. 422; *Hoy v. Taliaferro*, 8 Id. 727; *Duncan v. Lane*, Id. 744.

If the grantor in this deed had not been discharged by bankruptcy from the debt, there can be no question but that he could not set up the title under the judgment against the covenants in the deed. The question then arises, Are the covenants in the deed still in force? and is he bound by them, notwith-

standing his discharge under the bankrupt law? and is he entitled, by reason of his discharge, to take the position of a mere stranger in relation to the property conveyed by his deed?

By the fourth section of the bankrupt act, the certificate of discharge is to be "deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act." We have above seen that mortgages and liens on property were preserved; and by this portion of the act the extent to which the personal discharge of the party from his debts, contracts, and engagements was intended to go is limited and defined; and we have only to inquire, then, whether the covenants in the deed were "debts, contracts, or engagements" provable under the bankrupt act.

It is insisted, in behalf of the appellant, that the covenants were merely incidental to the debt, and as the debt was provable, so was its mere incident or security. This argument would apply with equal force to the deed as a security for the debt, as to the covenants contained in it; but we have seen above that it does not apply to the deed. The deed contains two essential and distinct qualities: 1. It conveys the property as a security for the debt; and 2. It covenants that the grantor has good right to convey it, that it is free from incumbrances, and that he will defend the title against the claims of all persons whatever. The pledge of the thing to pay the debt, and the covenant that the party has the right to make the pledge, are wholly distinct from each other; one is executed, the other executory. If, when the creditor seeks to avail himself of the property which the debtor has conveyed to secure his debt, he finds that it has been subjected to other incumbrances, he is entitled to his action against the covenantor for damages for the breach of his covenant; and this right of action accrues upon covenants against incumbrances at the time when the incumbrance is enforced or the adverse title asserted. This is a right superadded to the conveyance of the property, as the conveyance gives a right in addition to the debt; it is a security to the conveyance, as the conveyance was a security for the debt.

Nor can the covenants be regarded as an obligation to pay the debt, thereby reducing the claim to a form or character to render it provable in bankruptcy. It amounts merely to an obligation to pay to the creditor whatever damages he may sustain by the property being taken by adverse claims, or subjected to prior incumbrances. The property may be worth more or less than the amount of the debt at the time of the incumbrance suffered.

There is no covenant as to its value, and if it is subjected and sold in satisfaction of the debt without adverse claim or incumbrance, the covenants are satisfied without regard to the value of the property or the amount of its avails. The claim of the creditor, therefore, is one purely for damages, not reducible to any certain and specific amount, and which could not be properly ascertained but by the verdict of a jury; and it is well settled that such claims can not be proved in bankruptcy, either in England or in this country: Eden's Bankrupt Law, 132, 133, and cases there cited; *Murray v. De Rottenham*, 6 Johns. Ch. 52; *Dusar v. Murgalroyd*, 1 Wash. 13; *Bond v. Gardiner*, 4 Binn. 269.

In this case the breach of the covenant against adverse claims and for quiet enjoyment did not take place until after the appellant had been discharged as a bankrupt. Though the prior lien existed before the discharge, it might never be enforced, and the creditor could not assert any right in a legal point of view, upon the assumption that it would be enforced. Certainly the amount of damages could not be ascertained, even by a jury, until the lien was enforced. This shows conclusively that it was not such a claim as could have been proved under the bankruptcy.

It follows from this view of the subject, that the appellant was not discharged from his covenants in the deed, and consequently that he is estopped from setting up his subsequently acquired title against the claim of the appellee. As a legal proposition, this conclusion is well sustained by expositions given to the bankrupt laws by very high authorities. In an equitable point of view, the position of the appellant would not be more favored. After having pledged the property as a security for the payment of the debt, he would scarcely be heard, in point of mere equity, to set up a claim to the same property, founded on the existence of a prior lien which he had covenanted against, and thereby deprive his creditor of the security he had given, and appropriate the property to himself.

The decree of the chancellor is affirmed.

BUYING IN ADVERSE TITLES AND INCUMBRANCES: See *Champlin v. Dotson*, 53 Am. Dec. 102, and note 106, where the subject is fully discussed.

TERMS "GRANT, BARGAIN, AND SELL," used in a deed, imply a covenant against all acts done or suffered by the grantor, and the general covenant of warranty is equivalent to a covenant for quiet enjoyment: *Andrews v. McCoy*, 42 Am. Dec. 669. In *Gee v. Pharr*, 39 Id. 339, it was held that, under the statute, these words implied a warranty against incumbrances. The principal case was approved and followed in *Burrus v. Wilkinson*, 31 Miss. 543.

CASES
IN THE
SUPREME COURT
MISSOURI.

STATE v. FIELD.

[17 MISSOURI, 529.]

ACT OF LEGISLATURE WHICH DELEGATES LEGISLATIVE POWERS TO COUNTY COURTS IS UNCONSTITUTIONAL. So a general law affecting private rights, which takes effect by its terms, and contains a clause authorizing the county courts to suspend it at pleasure, is unconstitutional and void.

APPEAL from the circuit court of Saline county. The facts are stated in the opinion.

Gardenhire, attorney general, for the state.

Hayden, for the defendant.

By Court, GAMBLE, J. Field was indicted in the circuit court of Saline county for neglect of duty as a road overseer, under the sixty-sixth section of the act concerning roads and highways: R. C. 969. He moved to quash the indictment because the act of March 3, 1851, in the twenty-seventh section (Sess. Acts, 279), provided a different and inconsistent mode for the recovery of penalties, and therefore repealed the sections of the act in the revised code which imposed the penalties and provided for their recovery by indictment. To this it was replied that the thirty-third section of the act of March 3, 1851, provided that "if the county court of any county should be of opinion that the provisions of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in such county for the period specified in such order; and thereupon order the roads to be opened and kept in good

repair, under the laws theretofore in force, or the special acts on the subject of roads and highways in the several counties of this state, that might take effect and be in force after the fourth of July then next." It was alleged that, under this section, the county court of Saline county made an order at the November term, 1851, suspending the operation of the act until the second Monday in June, 1852, and that the offense for which the defendant was indicted was committed within the period for which the act was suspended. It was rejoined by the defendant that the act, notwithstanding the order of the county court suspending its operation, continued in force, because the section of the act which authorized the county courts to make such order was a delegation of legislative power to the county courts which was inconsistent with the constitution; and that therefore the section itself, and the action of the county court of Saline county under it, were unconstitutional and void. Of this opinion was the circuit court, and the indictment was quashed, which decision the state now brings before this court for review and reversal.

Without a minute examination and recapitulation of the various provisions of the act of March 3, 1851, it is sufficient to say that it embraces very many of the provisions necessary to a road system. It provides the mode of laying out roads, taking relinquishments from the proprietors of lands, condemning such as the owners refuse to relinquish, and ascertaining and paying the damages thereby incurred; it designates the persons liable to work on roads, and provides for their being taxed, as well as for a tax upon property, in order to keep the roads in repair; it provides for the collection of the taxes and their disbursement, for the appointment of overseers and compelling them to serve, and for penalties to be incurred by them for neglect of duty, and for the recovery of such penalties by prescribed judicial proceedings.

On all the different points on which a provision is made, it professes to be the declaration of the legislative will, and the subject it regulates is one of vast importance, not only to the people of the county, but to the people of the state at large.

Yet this act is submitted to the control of every county court, to make such order for its being in force in their county as they in their discretion may think proper. In other words, this act, by its own provisions, repeals the inconsistent provisions of a former act, and yet it is left to the county court to say which act shall be in force in their county. The act does not submit

the question to the county court as an original question, to be decided by that tribunal, whether the act shall commence its operation within the county; but it became by its own terms a law in every county not excepted by name in the act. It did not, then, require the county court to do any act in order to give it effect. But being the law in the county, and having by its provisions superseded and abrogated the inconsistent provisions of previous laws, the county court is, by the thirty-third section, empowered, for such time as they may think proper, to suspend this act and revive the repealed provisions of the former act. When the question is before the county court for that tribunal to determine which law shall be in force, it is urged before us that the power then to be exercised by the court is strictly legislative power, which, under our constitution, can not be delegated to that tribunal or to any other body of men in the state. In the present case, the question is not presented in the abstract; for the county court of Saline county, after the act had been for several months in force in that county, did by order suspend its operation; and during that suspension the offense was committed which is the subject of the present indictment, and the indictment itself was found.

The constitution of the state, after declaring that "the powers of government shall be divided into three departments, each of which shall be confided to a separate magistracy," proceeds to vest the legislative power of the government in these words: "The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives." The constitution of each house of the general assembly is provided for in the constitution, the qualifications of the members, and of the electors who choose them; the mode in which bills shall be passed and authenticated is also directed, and the machinery is complete for the exercise of the legislative power conferred upon the general assembly. The power thus conferred is the power to make laws; and the exercise of the power is intrusted to bodies of men, who are supposed to be selected by the great body of the people entitled to vote, because of their prudence, wisdom, and integrity. The laws to be passed form "the rule of civil conduct, commanding what is right and prohibiting what is wrong," and that rule derives its force from the fact that it is the will of the whole people, expressed by their authorized representatives in the forms provided by the constitution, and on subjects or questions on which the representatives have been intrusted to act. This power, thus reaching every

citizen in every relation and every interest, is to be regarded as a sacred trust, which is to be exercised by those to whom it has been committed, and every citizen has a right to demand that the rule for his conduct shall be established by that body in which he, with his other fellow-citizens, have vested the power. That portions of the people are sometimes organized as municipal corporations, and are intrusted with the power of making by-laws and ordinances for the regulation of their own local and peculiar interests, and to which their assent is given in the mode provided by law, does not make an exception to the rule that the legislative power conferred upon the general assembly is to be exercised by that body, and not to be delegated to others. The history of such corporations, their existence in the country previous to the adoption of the constitution, the principle of presumed consent to ordinances, and the uniform adjudication of courts show that the power conferred on such corporations to pass by-laws and ordinances, subject to the laws of the state, stands on peculiar grounds, and is not a part of the general legislative power which is committed to the general assembly, to be exercised only by that body.

And in the present case, the defense of this thirty-third section is mainly rested on the ground that the power conferred on the county courts is a power in relation to roads within the county, as cities and towns have power over their streets, and that the counties are, under our laws, *quasi* corporations, to which may be committed the power to adopt one or the other of state laws regulating roads. The fallacy of this argument will be readily perceived by attending to the case now before us. The defendant is indicted in the circuit court for a failure of duty as a road overseer; and he defends himself on the ground that, though he may be liable for his neglect of duty, and for the penalty imposed by law, yet the mode of recovering that penalty is not by indictment, but by action before a justice of the peace. The question which mode of proceeding shall be pursued depends on which law is in force in respect to the recovery of penalties, that of 1845 or that of 1851; and this is made to depend on the effect of an order of the county court of Saline county suspending the act of 1851, under the power conferred by its thirty-third section. If the order suspending the act is valid, and under a constitutional provision of the act of 1851, then the indictment can be maintained under the act of 1845; but if no such power to make an order could be given to the county court, then the act of 1851 is in full force, and the pro-

ceeding to recover the penalty must be before a justice of the peace. It appears impossible to doubt that the power which has been exercised by the court under the thirty-third section of the act, and which has the effect of determining what law shall be in force in the tribunals of the state for the recovery of penalties which its own laws impose, is a part of the legislative power which can not be intrusted to the county courts. If it can be, then this court, as well as the circuit courts, are bound by the law, as the county courts may have chosen between the different acts, and not only in the county of Saline, but in every other county not excepted in the act, there may have been at different times the one or the other of the different laws in force, as the county courts may have indicated by their orders. So that the orders of those courts are to be produced in the circuit courts, and even in this, not to prove facts, but to show the law which we are to administer. This bears a very strong resemblance to the exercise of legislative power by the county courts. In the case of *Parker v. Commonwealth*, 6 Pa. St. 507 [47 Am. Dec. 480], the question came before the supreme court of Pennsylvania whether an act giving to the citizens of certain counties the power to decide by vote whether the sale of vinous or spirituous liquors should be continued within such counties, and imposing a penalty for the sale of such liquors where a majority of the votes had been against such sale, was constitutional or not. Upon this question, a very long and able opinion was given by Mr. Justice Bills, in which, after a review of the history and character of our constitutional representative government, he examines the extent of the grant of "the legislative power to a general assembly to consist of a senate and house of representatives." After settling the extent of the grant, he proceeds to show that the legislative power and the responsibility for its correct exercise is with the general assembly, and that they can not consistently with their obligations delegate it to any other persons, whether it be to other individuals or a portion of the people, or the whole collected mass of the people of the state. Applying the principles thus declared to the law then under consideration, it is held to be unconstitutional and void, although it was said to be a law which engaged the feelings and had the support of a large number of the best and most influential citizens.

The difference between the statute which was before the supreme court of Pennsylvania and that now under consideration is, that the entire act there depended for its force in any county

upon the popular vote being cast in its favor at the polls, without which it was not to be binding as a law; while the act before us, being in its own terms the expression of the judgment and will of the legislature, allows, by its thirty-third section, the judgment and will of a county court to set aside that of the legislature and adopt a different rule. The difference between the two acts is more in form than substance. The question passed upon by the voters in Pennsylvania was, whether a law previously existing, which authorized the issuing of licenses for the sale of liquor, should be suspended for a year, so that no license during that time should be issued; and as the majority of voters determined, the law was or was not in force. The question in our act which is to be passed upon by the county court is, whether the new act shall be suspended and the old act revived, and if so, for how long a period. In *Rice v. Foster*, 4 Harr. (Del.) 479, the same questions are considered by the court of appeals of Delaware, in relation to an act which, in principle, was precisely like the Pennsylvania act, and the court decided that it was an unconstitutional attempt to delegate the legislative power which had been intrusted to the general assembly, and therefore void. The opinions delivered by the judges enter at large into the consideration of the nature of the powers intrusted to the legislative department, and enforce the duty of the legislature to exercise the powers upon their own responsibility. It is clearly shown that the power, thus committed by the people into the hands of their constitutional representatives, is not to be delegated to others not trusted by the people; nor is it within the contemplation of the constitution that the representatives shall attempt to yield up the power to any portion of the people themselves. It would be easy, by quoting from these and similar decisions in other states, to extend appropriate remarks upon the grant of legislative power in the constitution, and the impropriety and danger of its delegation to any other body of men, to very great length; but it is the province of the court to decide the case upon the principles involved in it, and not to write political essays.

It is the opinion of the court that the thirty-third section of the act of March 3, 1851, is unconstitutional and void, and that the action of the Saline county court had under that section, by which the act was suspended, was void, and therefore that the act itself was, at all times from its first taking effect, in force in Saline county. As its provisions for the recovery of the penalty against the defendant are inconsistent with the provisions of the

law under which he was indicted, and therefore repealed that law, the indictment was rightly quashed by the circuit court, and its judgment is, with the concurrence of the other judges, affirmed.

UNCONSTITUTIONAL PROVISION IN STATUTE RENDERS IT VOID to that extent only: See *Hoke v. Henderson*, 25 Am. Dec. 677; *Regents v. Williams*, 31 Id. 72; *Winter v. Jones*, 54 Id. 379; *Wright v. Wright's Lessee*, 56 Id. 723.

THE PRINCIPAL CASE WAS APPROVED in *St. Louis v. Alexander*, 23 Mo. 514; *Uhrig v. City of St. Louis*, 44 Id. 458; *State v. Wilcox*, 45 Id. 462; *Opinion of Supreme Court Judges on Township Organization Law*, 55 Id. 295; *Lammert v. Lidwell*, 62 Id. 191.

STATE v. JACKSON.

[17 MISSOURI, 544.]

WHERE SAME OFFENSE IS CHARGED IN DIFFERENT FORMS in the indictment, it rests with the court whether a prosecutor shall be compelled to elect on which count he shall proceed.

EVIDENCE OF THREATS IS INADMISSIBLE in favor of assailant, when it appears that sufficient time had elapsed for the blood to cool.

DECLARATION BY ASSAILED PARTY IN PALLIATION OF GUILT OF ACCUSED is inadmissible when the declaration was made some months subsequent to the commission of the assault.

APPEAL from Saline circuit court. The facts are stated in the opinion.

Gardenhire, attorney general, for the state.

Shackelford, for the defendant.

By Court, RYLAND, J. The defendant was indicted for feloniously assaulting and shooting one Jonathan Millsaps, with intent to kill him. There were several counts in the indictment. The defendant appeared and pleaded not guilty. At the trial term, after the jury were sworn, the defendant moved the court to compel the counsel for the state to elect under which count of the indictment the prisoner should be tried. This motion the court overruled, and the defendant excepted. The state then introduced testimony to prove the offense, and the defendant offered evidence in mitigation. The jury convicted the defendant, and assessed his punishment at two years imprisonment in the state penitentiary. A motion was made for a new trial, which being overruled, the defendant excepted, and brings the case here by writ of error.

The defendant, by his counsel, offered to prove in mitigation that defendant was informed on the evening of the day before the

shooting took place that Millsaps had made an agreement with defendant's wife to get her a divorce and marry her. This evidence was objected to by the state, and rejected by the court. The defendant then offered to prove that Millsaps had told a witness that another person was more to blame for the shooting than the defendant was. This was objected to by the attorney for the state, and the objections were sustained by the court. The defendant then offered to prove the general character of Millsaps as a desperado and dangerous man, and likely to carry his threats into execution. This proof, being objected to, was likewise excluded and rejected by the court. The case was submitted to the jury under instructions. Both parties asked the court to give instructions, and all the instructions prayed for by each party were given to the jury without any objection or exception. The only matters, then, for our consideration are the rulings of the court below in regard to the refusal to compel the circuit attorney to elect under which count the defendant should be tried, and the exclusion and rejection of evidence in mitigation.

The practice of compelling the state to elect the count on which the trial shall be had is one always addressed to the sound discretion of the court. When the court can see from the indictment that there is but one criminal act charged, although there are several counts in which the transaction is set forth in a different manner, and with different words and different averments, calculated to meet the different statements of the witnesses who are expected to prove the offense, it would cripple the prosecution to make the state elect. But where the court can see from the indictment that various different and distinct offenses, each a felony, have been charged in one indictment, then the discretion of the court may be exercised properly in making the order compelling the state to elect. This is always addressed to the discretion of the court, and this court will not reverse for the exercise of such discretion, unless in a case where the abuse is most obvious and manifest. To make the state elect on which count it would prosecute, in all cases where there is more than one count, would be to require, in practice, but one count in indictments. Yet we know that pleaders have always been cautioned and advised to arrange the formal charges constituting the crime, in different counts in different forms of the same indictment, so as to meet the evidence, as well as to meet the various constructions that penal statutes receive from different judges.

This practice of refusing or compelling the state to elect on which count to proceed, according to the best discretion of the courts, has prevailed in this state from its earliest judicial history; and for more than eighteen years my experience on the circuit bench recognized and approbated this practice. It was always looked upon as a matter of discretion: See *Storrs v. State*, 3 Mo. 7. It is the opinion of this court, then, that the court below did not err in refusing to make the state elect the count on which to proceed to try the prisoner in this case; for the indictment shows that the shooting of Millsaps was the offense, and the counts set forth and allege this offense in different phraseology and in different circumstances.

The court below did not err in refusing to admit the evidence offered in mitigation by the defendant. The testimony of Robert Jackson, which was excluded, was properly excluded. It was not competent evidence.

The witness stated that two or three weeks before Millsaps was shot he heard Millsaps say "that Alfred Jackson would not take care of his wife, nor let him do it; that he would help her to get a divorce from said Jackson;" that he frequently heard Millsaps say "that Alfred Jackson's wife had no husband, and ought to have somebody to attend to her. On Sunday evening last, Alfred Jackson told me that he had shot Millsaps." The witness said he had communicated to Alfred Jackson what he had heard Millsaps say. The words of the witness which are quoted above were excluded. It appears from the record that Robert Jackson had died after the examination first had before the justice of the peace who committed the prisoner. On this examination Robert Jackson had testified, and his testimony was reduced to writing; the above words were not permitted to be given in evidence when his written statement was offered. It does not appear from the evidence of Robert Jackson, taken before the justice who committed the prisoner, at what time he communicated these remarks of Millsaps about Jackson's wife to Jackson; there is nothing said about the time of his making these known to the prisoner, whether before or after he shot Millsaps. It was right, then, to exclude these words from the jury on this account if no other. The court did permit the balance of the statement to be read without any objection; and therefore, no other error than the exclusion of the above words was complained of by the prisoner in regard to the testimony of Robert Jackson.

The evidence of what Millsaps said some months after the

shooting about another person, whom he thought more to blame than the prisoner, was properly excluded. It was no evidence in mitigation. Though he blamed one more than another, this did not show that he thought this prisoner not guilty. It could not explain the transaction; it was properly overruled.

As to the character of the man shot (that is, Millsaps) for danger and desperation, it was properly excluded from the jury. There may be cases where the general character would be proper evidence before the jury; it would explain the situation of the parties and their acts and deeds at the time. But here is a man shot by the prisoner, as he says, at thirty yards distance, when the man shot exclaimed "he was unarmed," and when the prisoner says "he would have got the damned old rascal had he not got behind his horse"—a man exclaiming to the prisoner "not to shoot him, he was unarmed, though not afraid;" and yet the prisoner, when relating the occurrence, stated "he would have got the damned old rascal had he not got behind his horse," with as much seeming indifference to human life as though he were shooting at game. "Would have got him, but he got behind his horse"! The bad and dangerous character of the person killed will not justify his being shot under such circumstances; nor will it tend to mitigate the crime or lessen the guilt of the man-slayer. The court below, therefore, committed no error in overruling this evidence.

It seems that Jackson and his wife had separated, and that Millsaps had carried a pistol some months before, and threatened if Jackson came across his way or laid his hands on him, he would shoot him. But the evidence offered had no tendency to bring the threats down to the immediate cause of shooting. If there was time for the blood to cool, for the passions to subside, these remarks and threats will not mitigate: See the case decided at this term of *Collins v. Todd*, 17 Mo. 537, and the case of *Whitney v. Coxe*, 9 Id. 527. In looking over the whole record of the proceedings of the court below, no error appears requiring this court to reverse. This killing was, from the proof, felonious, and the imprisonment for two years is the lowest term of confinement in our penitentiary.

Let the judgment of the court below be affirmed, the other judges concurring.

FACTS CONSTITUTING JUSTIFICATION OF ASSAULT MUST BE SPECIALLY SHOWN: *State v. Morgan*, 38 Am. Dec. 714.

WHERE SEVERAL DISTINCT OFFENSES OF SAME NATURE ARE JOINED in the same indictment, whether in misdemeanor or felony, it rests in the dis-

cretion of the court to say whether the prosecutor must elect on which count he must proceed: *Commonwealth v. Gillespie*, 10 Am. Dec. 475.

THE PRINCIPAL CASE WAS FOLLOWED AS AUTHORITY on the point as to compelling an election of counts in *State v. Leonard*, 22 Mo. 449; *State v. Gray*, 37 Id. 463; *State v. Daubert*, 42 Id. 242; and was also authority on the question of introducing evidence relative to threats in *State v. Hays*, 23 Id. 315; and distinguished in *State v. Sloan*, 47 Id. 608.

CORWIN v. WALTON.

[18 MISSOURI, 71.]

RECORD OF INDICTMENT FOR ASSAULT AND BATTERY TO WHICH DEFENDANT PLEADED GUILTY is evidence in a civil action to recover damages for the same offense.

EXEMPLARY DAMAGES ARE RECOVERABLE IN ACTION FOR ASSAULT AND BATTERY, notwithstanding the defendant has been convicted and fined on a public prosecution for the same offense, and the plaintiff introduces the record of the criminal proceedings in order to prove the offense.

PUNISHMENT TO BE INFLICTED IN PUBLIC PROSECUTION MAY BE AFFECTED by verdict in civil action for the same offense, but damages to be recovered in the private suit are wholly uninfluenced by anything that may have transpired in the prosecution by the state.

ACTION to recover damages for assault and battery. The plaintiff introduced evidence tending to show an aggravated assault, by which he was seriously injured. He also introduced the record of the proceedings upon an indictment against the defendant for the same offense in order to show that the defendant had pleaded guilty to one of the counts. At the defendant's request, the judgment of the court upon the indictment and the sentence were also read, which showed that he had been fined five hundred dollars upon his plea of guilty. The court instructed the jury that they might assess exemplary damages. Verdict was for the plaintiff, and the defendant appealed.

Todd and Krum, for the appellant.

C. B. Lord, for the respondent.

By Court, SCOTT, J. The plea of guilty having been entered on the record in the case of the state against the present defendant on an indictment for the same offense, that record was evidence in the present action: 2 Taylor on Ev. 1115.

When an individual carried on a criminal prosecution and a civil action for the same offense, courts have held him to his election, and would not compel a defendant to discover the matter of his defense and evidence, unless the prosecutor would

give up the right which he might otherwise have to make use of this very discovery against the defendant in his civil action, which would be giving him a most unfair and unreasonable advantage: *Rex v. Fielding*, 2 Burr. 719. But this interference was only with the criminal prosecution; the courts did not assume any authority to stay or arrest in any way the private actions of individuals: *Jones v. Clay*, 1 Bos. & Pul. 191. In assessing the punishment, the courts would regard the fact that the person injured had recovered exemplary damages for the wrong done, and so the jury, who by statute have succeeded to the power of courts in assessing the punishment after a conviction, would be influenced in determining the degree of punishment by the fact that the party wronged had recovered vindictive damages for the same injury.

It would appear, then, that the damages of the party aggrieved in his action for the wrong done him were not liable to be affected by anything done in the public prosecution. The punishment inflicted may be affected by the verdict in the civil action, but the damages to be recovered in the private suit are wholly uninfluenced by anything that may have transpired in the prosecution carried on by the state. This being so, it was not a matter of any consequence from which side the proof of the conviction and fine proceeded. The plaintiff was entitled to exemplary damages, notwithstanding he produced such evidence himself.

Affirmed, the other judges content.

EXEMPLARY DAMAGES FOR CRIMINAL TORTS: See note to *Austin v. Wilson*, 50 Am. Dec. 770-775. The principal case is cited to the point that in cases of aggravated tort exemplary damages are permissible, in *Buckley v. Knapp*, 48 Mo. 162. *Freidenheit v. Edmundson*, 36 Id. 230, held that the jury might give damages beyond the value of the goods for breaking and entering the owner's store, seizing his property, putting his person in danger, breaking up his stock, and injuring his business, citing the principal case.

JUDGMENT IN CRIMINAL ACTION AS EVIDENCE IN CIVIL ACTION.—It can not be given in evidence: *Steel v. Cazeaux*, 13 Am. Dec. 288.

LEWIS v. HARVEY.

[18 MISSOURI, 74.]

ONE WRITING HIS NAME ON BACK OF NOTE, WHETHER NEGOTIABLE OR NOT, to which he is not a party, and before delivery to the payee, is to be treated as a maker of the note in the absence of evidence of a contrary intention.

PARTY INDORSING NOTE BEFORE DELIVERY TO PAYEE, AND CHARGED AS MAKER, may show that he signed as indorser, not as maker, and that such was the understanding of the parties at the time.

BURDEN OF PROOF IS UPON PARTY INDORSING NOTE BEFORE DELIVERY TO PAYEE, and charged as maker, to show that the parties making and accepting the paper regarded it only as paper indorsed by him.

INDORSEMENT BY THIRD PARTY TO RENDER HIM LIABLE AS MAKER need not be made contemporaneously with the execution of the note; if made before the note was completed and put into circulation, it is sufficient.

ACTION upon two promissory notes, of which John Wilkerson was maker and the plaintiffs the payees. The petition alleged that the defendants indorsed the notes before they were delivered to the plaintiffs, and thereby became liable as joint makers. The defendants' answer alleged that the defendants indorsed the notes at the request of George Hanna, who was the agent of Wilkerson, and whose name appeared upon the back of the note above the defendants'; that the defendants customarily indorsed notes for the accommodation of Wilkerson, and in the present case they supposed the plaintiffs would indorse the notes in such a manner that the defendants would be subsequent indorsers, this being the obligation they intended to assume; that the defendants were not privy to the consideration of the notes; and that the indorsement of the defendants was made long after the making of the notes by Wilkerson. Upon motion, this answer was stricken out, and from the judgment rendered for the plaintiffs the defendants appealed.

Thomas B. Hudson, for the appellants.

Glover & Richardson, for the respondents.

By Court, GAMBLE, J. The promissory notes described in the petition want the words "negotiable and payable," which under our statute are necessary to make them negotiable with the like effect as inland bills of exchange. They are signed by Wilkerson, made payable to the plaintiffs, and on the back of each the names of the defendants are written by the signature of Harvey & Stewart, which is the style of their firm. The petition charges them as makers of the notes.

In this country there has been a very great diversity of opinion in relation to the contract which the law implies from the fact that an individual writes his name on the back of a negotiable note which is already complete in having a maker and payee. But there does not appear to be the same difference in relation to notes which are not negotiable. The decisions in most of the states in which the liability of such party to a note

not negotiable has been considered appear to agree that he is liable as an original promisor; and in this state the question was decided in *Powell v. Thomas*, 7 Mo. 440 [38 Am. Dec. 465], and such was held to be the meaning and effect of his contract. In that case the opinion was expressed that the same rule applied to parties who bore the same relation to negotiable notes. It has been said that this was but an *obiter dictum*, as the note in that case was not negotiable; but it will be seen that the reason for considering the question in relation to such signature upon a negotiable note was, that a case of that description was then before the court, and as that case is not reported, the opinion in *Powell v. Thomas*, *supra*, must be regarded as designed to be the decision of the other case, in which the note was negotiable.

It may be doubtful whether the distinction made in the New York cases between notes negotiable and those which are not negotiable applies in this state. In New York their negotiable notes are those payable to order or to bearer, which by the English law are negotiable. Other notes can not be assigned so as to give the assignee a right of action in his own name, unless the assignor be dead and there is no executor or administrator, or if there be one, that he refuses to bring the action in his name: 2 R. L. 274, sec. 5. It seems that only in such cases are assignees recognized in courts of law. As on such notes in that state an indorsement has not the effect of transferring the right of action to the assignee, to be enforced in his own name, it appears that the courts have held that the name of a third party on the back of such note must be held to be different from the indorsement of negotiable paper, and subjects such party to liability either as maker or guarantor. As he can not occupy the position of indorser on negotiable paper, he must be held to have contracted in some other character. In this state, all notes, whether negotiable at common law or not, and whether in the form that makes them negotiable under the statute, as inland bills of exchange, or not, are assignable, so that the assignee may maintain an action thereon in his own name; and an assignor of a note not negotiable, although his contract is not that of an indorser of a note negotiable, incurs a liability to the assignee which is regulated by the statute. The name of a third person, then, upon the back of a note which is here assignable, although not a negotiable note under the statute, may be the means of his liability as assignor, although that liability differs from that of an indorser on negotiable paper. Without stopping, however, to inquire whether the decisions that have been

made in New York would have recognized a distinction between negotiable paper and such as is assignable under our statute, if such had been assignable there, we will proceed to examine briefly the principles upon which the cases now before this court involving these questions should be decided.

If a person who is not a party to a note writes his name upon the back, we do not perceive the correctness of the position that he is to be presumed to have signed only as an indorser. In the absence of all extrinsic evidence, we do not admit that such is the import of his signature. When he affixes his name to the paper, it must be regarded as then complete so far as he is concerned. He delivers to others the paper with his name upon it, and confers upon every holder the power to write over his signature any engagement that is consistent with his own act of affixing his name. To write over it an indorsement in the shape the paper then has is to take away all effect and meaning from his signature, because he is not payee. To hold that the effect of his signature is to bind him only as second indorser is to declare that the payee who holds the note is to have no benefit from the signature upon the back of it. It is true that the chancellor of New York, in *Hall v. Newcomb*, 7 Hill, 417 [42 Am. Dec. 82], suggests a cunning process by which the person who puts his name on the back of a note may be made liable to the payee, but this suggestion is answered by Senator Bockee, who says: "This sort of *finesse* and shuffling is below the dignity of the law. We must take this contract as the parties left it, complete and perfect when the note was delivered to Hall, and we have no right to ask him to resort to practices bordering on trick and deception for the purpose of changing the liabilities of the parties."

In *Tillman v. Wheeler*, 17 Johns. 328, and *Herrick v. Carman*, 12 Id. 160, it is held that the presumption of law, from the appearance of the paper, without extrinsic proof, is, that a third person who has put his name upon the back of a note has assumed only the responsibility of a second indorser. This may be regarded as the doctrine of the New York courts, but in the courts of Massachusetts a different doctrine prevails. It is held in Massachusetts that if a third person writes his name on the back of a promissory note at the time it is made he may be declared against, and is bound as a promisor: *Baker v. Briggs*, 8 Pick. 130 [19 Am. Dec. 311]; *Tenney v. Prince*, 4 Id. 385 [16 Am. Dec. 347]; *Austin v. Boyd*, 24 Id. 64. The same is the law in New Hampshire and Vermont: *Flint v. Day*, 9 Vt. 345; *Nash*

v. *Skinner*, 12 Id. 219 [36 Am. Dec. 338]; *Martin v. Boyd*, 11 N. H. 385 [35 Am. Dec. 501]. Such is also the law in South Carolina: *Stoney v. Beaubien*, 2 McMull. 313 [39 Am. Dec. 128]. In *Austin v. Boyd*, *supra*, Morton, J., says: "It is well settled, by a series of decisions in this commonwealth, that where a person not a party to a note puts his name upon it he thereby makes himself an original promisor. He must intend, by signing his name, to give some strength to the note and to incur some responsibility. He can not be an indorser, because the note is not payable to him, and perhaps is not negotiable. If he does not make himself liable as promisor or guarantor, the act is nugatory and unmeaning." We think the strength of argument is decidedly opposed to the conclusion that the party who puts his name upon the back of a note to which he is not a party, whether it be negotiable or not, is to be held only as an indorser. We think that he is to be taken to have assumed the obligation arising from the act of putting his name upon paper as it then was, and upon which he could not then be an indorser. Shall he then be held to be a guarantor, or a maker? In the absence of all extrinsic evidence, it is but giving effect to his signature to allow the holder to treat him as a maker, for that is the effect most beneficial to the holder, and is entirely consistent with the meaning of his signature.

It is very observable that in all, or nearly all, the cases in which these questions have been considered the parties produced evidence of their dealings and transactions before and at the time of the execution of the paper which was the foundation of the suit, and while the judges in their opinions state general principles as applicable to the cases decided, the cases themselves turn very much upon their own facts. Judge Story, in his treatise on promissory notes, section 479, says: "But whatever diversities of interpretation may be found in the authorities, where either a blank indorsement or a full indorsement is made by a third person on the back of a note made payable to the payee or order, or to the payee or bearer, as to whether he is to be deemed an absolute promisor or maker, or a guarantor, or an indorser, there is one principle admitted by all of them, and that is, that the interpretation ought to be just such as carries into effect the true intention of the parties, which may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the party indorsing the note intended at the time to be bound only as a guarantor of the maker, he shall not be deemed to be a joint promisor or an

absolute promisor to the payee. If he intended only to be a second indorser on the note, he shall never be held liable to the payee as a first indorser. It is only in cases where the evidence on these points is doubtful or obscure, or totally wanting, that the courts of law adopt rules of interpretation as furnishing presumptions of the actual intention of the parties." The intention of the parties to the transaction is undoubtedly the object of inquiry, and it is to be ascertained by rules of interpretation applied to the paper itself, where there is no extrinsic evidence. One of the first of those rules would seem to require that the instrument shall be made as favorable to the party to whom it has been passed as its terms or its character will admit. In the absence of evidence, the party is to be treated as a maker of the note.

In the present case, the defendants are charged as makers, and in their answer they allege that, at the request of Hanna, whose name was already upon the back of the notes, "they indorsed them, intending to become indorsers of the notes according to the ordinary, usual custom of indorsing mercantile paper, and according to the position their names would have occupied had said plaintiffs indorsed said notes as expected." They also deny "that they are joint makers of said notes, or intended to become such at the time they indorsed the same."

These allegations in the answer would admit the defendants to prove that they indorsed the notes merely as indorsers, and that they did not sign their names under circumstances that would admit of their being held as makers. If such evidence is admissible, the allegations are sufficient to admit it as a defense, it being an affirmative defense, to be made out by the defendants, on whom the onus rests of showing that the parties making and accepting the paper regarded it only as paper indorsed by the defendants. In the case of *Powell v. Thomas*, *supra*, it is said: "This, we hold, is the light in which a blank indorsement, made by a party who is not the payee of a note, is to be regarded, if nothing to the contrary appears. The real contract of the parties may be shown; but in the absence of all proof, the foregoing are the principles by which we think courts should be governed in determining the liability of a party who, when not a payee or indorsee, will make a blank indorsement on a promissory note." According to this declaration of the law, the party charged as maker may show the real character of the transaction, and that he did not become a maker of the note by

putting his name on the back; that such was not the understanding of the parties when it was made.

There is nothing in the point that the defendants indorsed the note after it had been executed, so that their act and the making of the note were not contemporaneous. The defendants put their names on the note while yet it was in the hands of the agent of the maker, as they state in their answer, and their signature was therefore made before the note was completed and put into circulation. The circumstances of this case are wholly unlike that of *Tenney v. Prince*, 4 Pick. 385.

The answer of the defendants, under the present loose system of practice, may be understood as denying the allegation of the petition that he signed the notes as maker, and as asserting that he became a party only as indorser. In this view of the answer, it presented a defense of which the court was bound to take notice, and which it was improper to strike out.

The judgment will be reversed, and the cause remanded for further proceedings.

ONE WRITING HIS NAME ON BACK OF NOTE BEFORE DELIVERY TO PAYEE is an original party to the note: *Carroll v. Weld*, 56 Am. Dec. 481, and note citing prior cases. The principal case is cited to this point in *Perry v. Barrett*, 18 Mo. 143; *Schneider v. Shiffman*, 20 Id. 571; *Baker v. Block*, 30 Id. 227; *Western Boatmen's Benevolent Association v. Wolff*, 45 Id. 105; in the absence of extrinsic evidence: *Stagg v. Sinnensfelder*, 59 Id. 342; *Kuntz v. Tempel*, 48 Id. 76; *Rickey v. Dameron*, Id. 64.

EXTRINSIC EVIDENCE TO SHOW THAT APPARENT LIABILITY ON NOTE IS NOT REAL LIABILITY.—Party signing note as maker may by extrinsic evidence show whenever it is material that he signed as surety, and that this was known to the party suing on the note: *Lime Rock Bank v. Mallett*, 56 Am. Dec. 673. So one who incurs the liability of maker by writing his name on the back of a note may, as between the parties to the note, show the real obligation intended to be assumed at the time of signing: *Sylvester v. Downer*, 49 Id. 786; *Bright v. Carpenter*, 34 Id. 432. See *Perkins v. Callin*, 29 Id. 282.

PAROL EVIDENCE IS ADMISSIBLE TO SHOW THAT ONE WRITING HIS NAME on back of note before delivery to the payee signed as indorser, and not as maker; but *prima facie* he is liable as a maker. The principal case is cited to this effect in *Beidman v. Gray*, 35 Mo. 282, 283; *Mammon v. Hartman*, 51 Id. 168; *Chaffee v. Railroad*, 64 Id. 195; *Semple v. Turner*, 65 Id. 697. In *Rickey v. Dameron*, 48 Id. 64, it was cited to this effect, but it was held in that case that one who indorsed a bill of exchange after the indorsement of the drawer, to whose order it was payable, was an indorser, not a joint maker.

INDORSEMENT UPON NOTE IN HANDS OF PAYEE IS PRESUMED to be made at execution of the note, and upon the same consideration: *Carroll v. Weld*, 56 Am. Dec. 481; *Colburn v. Averill*, 50 Id. 630; and if made subsequent to the date of the note, it is presumed to have been made upon a different consideration, and the indorser will be regarded as a guarantor: *Colburn v. Averill*, *supra*.

BENNY v. RHODES.

[18 MISSOURI, 147.]

DELIVERY OF PRINCIPAL'S GOODS BY FACTOR IN PAYMENT OF HIS OWN DEBT is not a sale, and does not divest the principal's title.

FACTOR IN ORDER TO PASS TITLE OF PRINCIPAL must sell the property according to the usages of trade.

FACTOR CAN NOT DELIVER GOODS OF PRINCIPAL IN SATISFACTION OF HIS OWN DEBT, or sell them in an irregular manner so as to pass the title, though he have a lien on the goods for his advances.

FACTOR MAY PROTECT HIMSELF TO EXTENT OF HIS ADVANCES by selling his principal's goods.

WHERE FACTOR HAS DELIVERED GOODS OF PRINCIPAL IN SATISFACTION OF HIS OWN DEBT, although the factor has accepted and paid a bill of the principal drawn on account of the consignment, which exceeds in amount the value of the goods delivered, and there has been no appropriation of that payment to any particular items of the account between the principal and factor, nevertheless that amount will not be appropriated to payment for the goods so delivered by the factor.

CREDITOR OF FACTOR ACQUIRES NO TITLE TO GOODS OF PRINCIPAL delivered to him in payment of factor's debt, unless the principal has received payment for the whole consignment from which the goods so delivered are taken, or has ratified the factor's act.

APPEAL from St. Louis court of common pleas. The opinion states the case.

Todd and Krum, for the appellant.

T. T. Gantt, for the respondents.

By Court, GAMBLE, J. This is a civil action to recover the value of specific articles, the property of plaintiffs, alleged to have been converted by defendant to his own use. The case was tried by the court without a jury, and the facts were found as contained in the deposition of a witness. The goods, for the value of which the suit was brought, were consigned by plaintiffs to Love & Osborne of St. Louis for sale; Love & Osborne being commission merchants. The factors, being indebted to the defendant in the amount of a note, were urged by him to make payment, and he offered to take payment in the goods of the plaintiffs. The factors informed the defendant that the goods did not belong to them, but were the property of plaintiffs, and only in their possession for sale as commission merchants. The defendant, urging the factors to sell him the goods in payment of their note, at last prevailed over their scruples, and the articles were sold to defendant, and the note of the factors satisfied and delivered up. At the time of this transac-

tion, the factors, as consignees of the goods, had paid out money for freight and charges upon the goods. There was a memorandum of sales sent to plaintiffs by the factors, in which the amount of the goods sold to the defendant was included, but no regular account of sales was rendered for several months after the sale. In that account the sale to defendant was stated. In the mean time the plaintiffs had drawn bills upon the factors, which had been accepted, and one of them, for an amount exceeding the value of the articles which the defendant had received, had been paid by the factors. When the account of sales was rendered, the factors were indebted to the plaintiffs. The plaintiffs demanded the property of the defendant, claiming that under the circumstances their title had not been divested.

As the title to the property was in the plaintiffs, the question is, whether it has been divested, and if it has, by what act, and when. The transaction in which the defendant obtained the plaintiffs' goods was with an agent, and it was requisite, in order that the principal should be bound, that the authority of the agent, whether express or implied, should be pursued. The agent was intrusted with the goods of the principal for the purpose of sale for the benefit of the principal. In the absence of particular instructions, the agent was authorized to sell according to the usual mode of dealing in the particular trade which he was conducting. In such case, he might sell on credit, if sales on credit were customary in that trade and at that place. If he sells in an unusual manner, not warranted by the custom of the trade, and without express authority, the principal is not bound by his act. An agent for sale can not barter the goods of his principal, nor can he pledge them. The law that a factor can not pledge the goods of his principal was declared in *Paterson v. Tash*, 2 Stra. 1178, and has been followed by a long train of decisions in England, so that it became necessary to resort to parliament to change the law, as was done by 4 Geo. IV., c. 83; 6 Geo. IV., c. 94-96; Vict., c. 39. The same doctrine is maintained in the states of this Union, and in some of them statutes have been passed to alter it in some respects, as in England.

In the cases in which courts have been called on to examine the power of the factor to affect the title of the principal, the true nature and design of the transaction has been regarded, and where it appeared that the substance of the arrangement was a pledge of the property, however it might be disguised

under the appearance of a sale, the right of the principal was protected. In *Holton v. Smith*, 7 N. H. 446, it was held that an agent having the goods of his principal to sell could not sell them to his own creditor in payment of his own debt, so as to pass the title. In answer to the suggestion that the agent might have sold the goods and received and squandered the money, and so the title would have passed and the principal have been without remedy except as against the agent, the court remarked: "If a principal may be subjected to loss in such modes, it is because he has thus far trusted to the fidelity of the agent, and this furnishes no reason why the law should permit the agent to defraud him in other cases." In *Warner v. Martin*, 11 How. 226, the supreme court of the United States says: "When a contract is proposed between factors, or between a factor and a creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word, or in any sense in which it is used in reference to the commission which a factor has to sell. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such transfer; but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another, in release of his obligation, their relation has only been changed by his violation of an agency which society, in its business relations, can not do without. When such a transfer is made by a factor, for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more: it is a violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt is not one thing or the other; both debtor and creditor know it to be neither."

These cases only apply the rule that "the factor in order to pass the title of his principal must sell the property according to the usages of trade," to the facts which were presented to the courts. They are not new in principle. Applying that rule to the case now before us, it is clear that the pretended sale to Rhodes did not divest the title of the plaintiffs, as a regular sale within the scope of a factor's authority. But if it has subsequently been confirmed by the principal, it will be equally effectual. Now, there is no pretense, from any fact found by the court below or in the evidence given, that the plaintiffs ever knew or suspected the real character of the transaction be-

tween Rhodes and their agent during the continuance of the agency; or that, after they came to the knowledge of the facts, they did any act to approve or ratify it.

But it is insisted that the factors, having a lien upon the goods for the amount of their advances made previous to the sale to Rhodes, were authorized to sell for their own reimbursement, and might, to the amount of their advances, sell on their own account and for the satisfaction of their own debt to their creditor, Rhodes. To this it might be replied, that the facts found by the court show that the transaction between Rhodes and the factor was not a sale under any such assertion of right by the factor. Again, the factor can not dispose of the goods of his principal in an unusual mode, even to reimburse his charges. The case of *Graham v. Dyster*, 2 Stark. N. P. 23, is a very strong case to show that the factor can not pledge goods to raise funds for the purpose of meeting bills drawn by the principal, or of reimbursing advances made upon the goods. So in *McCombie v. Davies*, 7 East, 6, it was held that a person taking goods in pledge from a factor could not avail himself of the right which the factor had to retain the goods under a lien for advances, the pledge of the goods being, in respect to the principal, a tortious act. Although a factor may sell, to reimburse his advances, so much of the consignment as is necessary for that purpose, *Brown v. McGran*, 14 Pet. 495, yet such sale is to be in the usual mode. In the present case the amount turned over to Rhodes largely exceeded the amount which had been paid for freight and drayage, and was delivered to him at cash prices, while it was to be reported to the plaintiffs as a sale at six months, so as to give the factor time in his account with his principal. This contrivance was the suggestion of Rhodes, and was discussed and agreed upon between the parties. It was not, in the understanding of either party, a sale on account of advances made, but a mere tortious appropriation of the goods of the principal. It was not, according to the opinion in *Warner v. Martin*, *supra*, a sale in the proper sense of that term.

It is next insisted that as the factor has accepted and paid a bill of the principal drawn on account of the consignment, which exceeds in amount the value of the goods delivered to Rhodes, and there has been no appropriation of that payment to any particular items of the account between the principal and factor, it ought to be appropriated to the satisfaction of the charge arising from the sale to Rhodes. This being an action for the recovery of the value of property alleged to have been

tortiously delivered by the factor to Rhodes, the position here assumed is, that although the title to the property did not pass by the transfer of it made to Rhodes, yet the court will, by a rule for the application of payments, exempt Rhodes from his liability to the plaintiffs, and sanction the contrivance between him and the factor by holding that the principal has been paid for that part of his property consigned to the factor which Rhodes obtained, and that the loss sustained by the failure of the factor is a loss upon the articles subsequently sold. Now, the authorities do not justify the application of any such rule to this case; for—1. The account of sales rendered to the plaintiffs is not on the record, and therefore we do not know what place the transaction occupies in it; 2. The memorandum of sales which was sent to the plaintiffs has no sale corresponding in date or amount with the pretended sale to Rhodes; and 3. If the account did show a sale as having been made to Rhodes at six months, we would allow no ingenious use of the general rule upon which courts apply payments to operate a change of title to the plaintiffs' property, which before the payment was still in the plaintiffs, and had been converted by Rhodes. In other words, unless the plaintiffs had received payment for their whole consignment, they will not be held bound by the transaction between their factor and Rhodes, of the true nature of which they were not informed. Rhodes, as wrongfully in the possession of their property, can only hold it by their ratification of the factor's act, or by their being satisfied for the whole consignment. If both parties omit the application of payments, the law will apply them according to justice: *United States v. Kirkpatrick*, 9 Wheat. 737; *Smith v. Loyd*, 11 Leigh, 516 [37 Am. Dec. 621].

The judgment is, with the concurrence of the other judges, affirmed.

FACTOR CAN NOT PLEDGE GOODS OF PRINCIPAL AS SECURITY FOR HIS OWN DEBT: *Bott v. McCoy*, 56 Am. Dec. 223; *Bowie v. Napier*, 10 Id. 641, and extensive note discussing the subject; *Bigelow v. Walker*, 58 Id. 156. The principal case is cited to this effect in *Wright v. Solomon*, 19 Cal. 72.

FACTOR CAN NOT DELIVER GOODS IN SATISFACTION OF HIS OWN DEBT so as to pass the title, although he have a lien upon the goods for his advances: See *Benny v. Pegram*, *post*, p. 298, a case which arose out of much the same facts as the principal case.

FACTOR MAY PROTECT HIMSELF FOR ADVANCES MADE BY SELLING PRINCIPAL'S GOODS. The principal case is cited to this effect in *Howard v. Smith*, 56 Mo. 314.

BENNY v. PEGRAM.

[18 MISSOURI, 191.]

FACTOR CAN NOT DELIVER PRINCIPAL'S GOODS IN SATISFACTION OF HIS OWN DEBT so as to pass title, though the accounts between the factor and principal may be in the factor's favor.

ACTION to recover glass consigned by the plaintiffs to Love & Osborne, commission merchants, to be sold. Love & Osborne delivered the glass to the defendants in payment of their own debt, informing the defendants that the glass did not belong to them. There was evidence showing Love & Osborne to have been in advance to the plaintiffs when the glass was received. The court refused the instruction that the plaintiffs' right of recovery would be affected by the state of the accounts between them and Love & Osborne.

Todd & Krum, for the defendants and appellants.

T. T. Gantt, for the plaintiffs and respondents.

By Court, GAMBLE, J. The only difference between this case and that of the same plaintiffs against Rhodes [*ante*, p. 293] is, that in the present case reliance is placed upon the fact that at the time the factors delivered to the defendants the goods of their principals in payment of a debt due from themselves to the defendants, the factors were in advance to the principals to an amount equal to or greater than the value of the property so delivered. It has been stated in Rhodes' case, that although a factor may sell enough of the goods consigned to him to reimburse himself for his advances, yet such sale is to be a real sale, made in the usual mode, and not a delivery of the property to the creditor of the factor in payment of his debt. In the trust which a factor has to discharge for a distant principal, it is necessary that good faith to the principal should be observed, and it would be dangerous to allow him under a power to sell to use the goods as his own in paying his own debts; and in a case like the present, where a factor in failing circumstances delivers the goods of his principal to his own creditor in payment of his debt, it is not proper to allow the question of title to the property to depend on the then state of accounts between the principal and factor. If the principal has been satisfied for his whole consignment, or has with knowledge of the transaction between the factor and his creditor ratified it, he has no right of action. The instructions refused by the court on the part of the defendants are not critically examined, because in the case

as made in the evidence those given for the plaintiffs declared the law of the case correctly.

The judgment is affirmed, with the concurrence of the other judges.

PLEDGE OR DELIVERY BY FACTOR OF PRINCIPAL'S GOODS: See *Benny v. Rhodes*, ante, p. 293, a case similar to the principal case, and arising out of much the same facts. And see the note thereto citing the prior cases in this series. The principal case is cited to the point that a factor can not pledge the goods of his principal for his own debt, in *Wright v. Solomon*, 19 Cal. 72, where *Benny v. Rhodes*, ante, p. 293, is also cited.

MORRISON'S ADMINISTRATOR v. TENNESSEE MARINE AND FIRE INSURANCE CO.

[18 MISSOURI, 262.]

ABSOLUTE ASSIGNMENT OR SALE OF INSURED PROPERTY AFTER INSURANCE IS MADE takes away the insurable interest of the vendor, and creates a bar to the right of action on the policy, unless by some means its existence has been preserved for the benefit of the assignee.

CONTRACT OF INSURANCE IS CONTRACT OF INDEMNITY.

CONVEYANCE OF SUBJECT-MATTER OF POLICY DOES NOT BAR RECOVERY BY INSURED to the extent of his actual loss, provided it does not exceed the sum insured, if the conveyance be in the nature of a mortgage, or in trust, with a resulting trust to the insured.

INSURED WHO HAS CONVEYED INSURED PROPERTY RETAINS INSURABLE INTEREST, and may recover his actual loss, not exceeding the amount insured, when the grantee, at the time of the conveyance, reconveys the property to a third person as trustee for the insured to secure the payment of the purchase money.

FRAUDULENT CONCEALMENT OR MISREPRESENTATION IN REGARD TO OWNER'S INTEREST, to the prejudice of the underwriter, will avoid the policy.

FAILURE OF INSURED TO DISCLOSE NATURE AND EXTENT OF HIS INTEREST in property insured will not avoid the policy, in the absence of fraud. The insurer may protect himself by requiring a description of the interest of the applicant.

WHERE INSURED HAS CONVEYED PROPERTY INSURED, RIGHT OF INSURER TO BE SUBROGATED to the securities of the insured for the payment of the purchase money can not arise until there is a recovery of the insurance, if at all.

APPEAL from St. Louis court of common pleas. The opinion states the case.

E. & B. Bates, for the appellant.

F. M. Haight, and *Todd & Krum*, for the respondent.

By Court, SCOTT, J. This was an action on a policy of insurance against fire on a dwelling-house. The action was begun

by the assured, J. S. Morrison, and he dying, the suit was prosecuted in the name of the respondent, his administrator. It is averred in the petition that while the said policy was in full force, and before its expiration, Morrison, in consideration of the sum of sixty-six thousand one hundred and sixty-six dollars, conveyed the ground on which the insured buildings were and the buildings thereon, with other lands, to S. M. Bowman; that no part of the consideration money was paid to Morrison, but at the time of said conveyance the said Bowman executed and delivered to Barton Bates, trustee for Morrison, a deed or reconveyance of the same premises, conditioned to pay the said Morrison the consideration money of said sale. To this petition there was a demurrer, which was overruled, and a judgment was rendered for the plaintiff. The defendant maintains that Morrison, by his conveyance to Bowman, was divested of all interest in the subject-matter of the insurance, and therefore could maintain no action on the policy; or if the transaction with Bowman did not produce that effect, it at least so changed the interest of the assured and diminished its value as to release the underwriter.

The general principle is, that an absolute assignment or sale after the insurance is made takes away the insurable interest of the vendor, and creates a bar to the right of action on the policy, unless by some means its existence has been preserved for the benefit of the assignee. After the assured has parted with all his interest in the property insured, he stands as though he never had any right in the subject of the insurance, and therefore can not effect a valid policy upon it. The contract of assurance is no longer a contract of wager; it is a contract of indemnity, and nobody can recover in respect to the loss who is not really interested. This principle is too obvious to require a citation of authorities in its support.

But notwithstanding a conveyance of the subject-matter of a policy, if it be in the nature of a mortgage, or in trust, with a resulting trust to the insured, so that he has an insurable interest in the property, he may nevertheless recover to the extent of his actual loss, provided it does not exceed the sum insured. The transfer of the property will only prevent a recovery on the policy by the assignor, so far as it deprives him of his insurable interest, without regard to the inquiry whether the interest which remains after the assignment be of the same nature and character as that which existed before it was made. Hence it has been held that the owner of real estate, which he

has sold after an assurance, who retains the legal title as a security for the purchase money, may maintain an action for a loss after the contract of sale: *Trumbull v. Portage Ins. Co.*, 12 Ohio, 305; *Stetson v. Massachusetts Mutual Fire Ins. Co.*, 4 Mass. 330 [3 Am. Dec. 217]. In the case of *Higginson v. Dall*, 13 Id. 96, it was held that a mortgage on a vessel at the time of effecting the policy did not deprive the assured of his insurable interest, nor of his right of recovery on the policy. In the case of *Gordon v. Mass. Fire & Mar. Ins. Co.*, 2 Pick. 249, the vessel insured was afterwards conveyed away to others, but as the purchasers, at the time of sale, by a memorandum, promised, and subsequently by a covenant undertook, to apply the proceeds to the discharge of debts due to them from the assignor, it was held that the right of recovery was not affected by the transaction. In the case of *Locke v. The N. A. Ins. Co.*, 13 Mass. 61, the plaintiff shipped a quantity of fish for the benefit of another, to whom he was indebted, and a bill of lading was taken in the name of the creditor. The fish was lost, and the plaintiff was permitted to recover on the policy on the fish, notwithstanding it was objected that he had no interest. The court regarded the transaction as an assignment of property to secure the payment of a debt. So the inquiry seems to be narrowed down to the point, whether the plaintiff retained an insurable interest in the subject of the policy at the time of the loss. Had the reconveyance been made to Morrison himself, the present case would have been almost parallel with that of *Stetson v. Mass. Mutual Fire Ins. Co.*, *supra*. The conveyance and reconveyance must be regarded as one transaction, and it can make no difference in principle whether the interest reconveyed is a legal or equitable one. Whether it was made directly to the vendor or to another in trust for him, in either event he has the same interest in value, and they are equally insurable.

An important principle is involved in the inquiry as to the duty of the owner in making disclosures of the nature, extent, and value of the interest in the property on which he seeks insurance against losses by fire. Any interest in property is insurable. But what is the duty of the owner of that interest who seeks insurance upon it? Should he minutely disclose his title and all the incumbrances on the property? or should the insurer demand from him information in relation to these matters? There is no doubt that a fraudulent concealment or misrepresentation in regard to the owner's interest, to the prejudice of the underwriter, will avoid the policy. The views of the

supreme court of the United States on this subject vary from those entertained by other tribunals whose reputation entitles their opinion to great respect. The summary of the argument of that court is, that the contract of insurance is one in which the underwriters generally act under the representations of the assured; consequently those representations should be fair, and omit nothing which is material for the underwriters to know. Every circumstance which would increase the risk or would induce a demand for a greater premium should be disclosed. Insurances against fire are usually made in the confidence that the assured will use all care to avoid the loss of the property which his interest can suggest. The extent of this interest must always influence the underwriter in taking or rejecting the insurance and in estimating the premium. Hence it is necessary that he should be informed of the nature and extent of the interest for which an insurance is sought. Underwriters do not rely so much upon the principles of men as upon their interests. That the materiality of the facts concealed or of the representations made is a matter of fact for the jury, and can not be determined as a matter of law by the court: *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25.

This question was involved in the case of *Tyler v. Ætna Fire Ins. Co.*, 12 Wend. 507. There a vendee, under articles of agreement to purchase the insured premises, entered into possession with a considerable portion of the purchase money unpaid. He insured the premises as his own, without disclosing the real nature of his interest in them. This was relied on as a material misrepresentation which avoided the policy, and the case of *Columbian Ins. Co. v. Lawrence*, *supra*, was cited to show that the plaintiff could not recover. But the court maintained that it had been deliberately settled in Massachusetts, as an established principle of the law of insurance, that a *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured, unless there be a false affirmation or representation, or a concealment after inquiry of the true state of the property; and that the applicant need not represent the particular interest he has at the time, unless inquired of by the insurer; that the course of decisions had been upon this understanding of the law and in accordance with it, and such was apprehended to be the doctrine of the courts of England: *Lawrence v. Van Horne*, 1 Cai. 276; *Kenny v. Clarkson*, 1 Johns. 385 [3 Am. Dec. 336]; *Murray v. Columbian Ins.*

Co., 11 Id. 302; *Traders' Ins. Co. v. Robert*, 9 Wend. 409; Marsh. on Ins. 682, 683, 730; Phill. on Ins. 64, 94; that the nature and extent of the interest of the insured may, in some instances, be material facts in making up an estimate of the risk and rate of premium; and upon general principles applicable to this action, a disclosure would seem to be required, but generally they can not be so material as to justify a conclusion that they would have varied the premium paid. The necessity of disclosing the title of the applicant would greatly embarrass the operation of insurance, without affording any essential benefit to the insurers. Any error in the deduction or description of title might be fatal. The rights of the insurer are sufficiently guarded, by having it in his power to exact, by inquiry, a description of the interest of the applicant, and by the recovery being limited in case of loss to the value of the interest proved on the trial. The minuteness of the proposals and conditions as to the description required of property to be insured, without specifying the nature or extent of the interest, affords a reasonable inference that this information is not deemed generally material and indispensable.

These views commend themselves to our judgment by their justness, and we are satisfied will effect more solid justice between the assured and the insurer than the contrary doctrine. It can not have escaped observation that at first sight many of the principles of the law of insurance are seemingly very arbitrary, and their necessity and policy can only be seen and felt by those who are called upon to give them a practical application. The man without guile, who asks for insurance on his property, is not aware of the necessity of disclosures which long experience in insurance offices has shown to the underwriter to be necessary; and to hold his policy void for not making disclosures of the importance of which he is not aware would be gross injustice. If applicants for insurance are to be held to a strict representation and proof of the nature and extent of their interest in property on which they apply for insurance, they will almost invariably lose the benefit of their policies. Are the liens of taxes, judgments, and such like to avoid policies, unless they are disclosed, when they may be entirely out of mind and forgotten? If, from a want of the knowledge of the law, the assured mistakes the nature of his title, although he may have one equally valuable, is his policy to be avoided? It is no answer to say that the misrepresentation must be material. What is material must be determined

from the circumstances of each case. What is material in one case may not be so in another, and so a wide field for litigation will be opened. The ends of justice will be best subserved by holding the assured only responsible for fraud. Insurance companies may protect themselves by inquiries in relation to these things, and after filling their policies with so much detail and such *minutiæ* of information in regard to other matters, as to create the impression that they are satisfied, to hold that they are not bound by their contracts, unless information of another kind is communicated by the assured, which is not sought for, would be enabling them to commit the rankest injustice.

The fact that the notes given for the lot by Bowman are still due, and the right to be subrogated to the securities of the assured, can not be considered in this litigation. A right to be subrogated can not arise until there is a recovery of the money against the company, if at all. There are not facts sufficient upon which any action can be founded in relation to that matter, if it could be inquired into here; nor is there anything upon the record which shows that the damages assessed by the court are not the standard of the loss of the assured.

Judge RYLAND concurring, the judgment is affirmed.

Judge GAMBLE did not sit in the cause.

RECOVERY BY INSURER RETAINING LIEN OR INSURABLE INTEREST AFTER ALIENATION OF INSURED PROPERTY IN DEFIANCE OF CONDITION IN POLICY IN RESTRAINT OF ALIENATION.—Most insurance policies contain conditions providing that the policy shall be void whenever the property insured shall come either partially or wholly into the ownership of others than the assured. These provisions are worded in different ways; some merely restricting the conveyance or sale of the property, while others seek to embrace within the scope of their language any modification or incumbrance whatever of the title of the insured as it existed at the commencement of the risk. The language used in these provisos is usually general in its nature, avoiding an enumeration of forbidden acts with respect to the ownership of the property, and endeavoring to include within general terms, such as "alienation," "transfer of interest," "change of title," and the like, those encroachments upon the insurer's property which the insurance companies deem detrimental to their interests. The construction of these general terms and the determination of their scope have taxed the ingenuity of counsel, and produced many subtle judicial distinctions. In such cases, some conflict of authority is to be expected. In approaching this question, however, the courts are predisposed in favor of the assured; at least, they construe the policy against the insurer, as the pleading against the pleader, most strongly *contra proferentem*. The clause in restraint of alienation will be strictly construed, and confined within the narrowest limits: *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68; *Hoffman v. Aetna Fire Ins. Co.*, 32 Id. 405. "Courts will not be astute to find ways to work a forfeiture of a contract of insurance; rather they will strive to uphold

it, and will construe conditions and provisions in a policy strongly against an underwriter, and will incline to uphold the agreement:" *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98, 100; *McMaster v. Ins. Co. of North America*, 55 Id. 222, 232. And the burden of proof to show a breach of the condition will of course rest upon the insurer: *Orrell v. Hampden etc. Ins. Co.*, 13 Gray, 431. The subject of alienation as defeating a claim for insurance receives general treatment in the note to *Lane v. Maine Mutual F. Ins. Co.*, 28 Am. Dec. 154-159.

IN ABSENCE OF ANY CONDITION IN POLICY, the determination whether the assured can recover in case of loss after he has incumbered his title will rest upon the decision of the question whether he retains an insurable interest or not. Insurance is a personal contract, and a contract of indemnity. If the insured has lost nothing, he recovers nothing. What constitutes an insurable interest in property is discussed in the note to *Strong v. Manufacturers' Ins. Co.*, 20 Am. Dec. 510 et seq. The policy contained no provisions against alienation, in *Insurance Co. v. Sampson*, 38 Ohio St. 672, and the question was, whether the insured had an assurable interest at the time of the loss. A sale under a mortgage had been made, and the sale confirmed. The confirmation was afterwards vacated and the sale set aside. But in the mean while the property was burned, before the confirmation and sale were set aside, but it was held that the mortgagor in possession was not divested of his insurable interest by such unauthorized sale and confirmation. Where a moiety of a building insured was conveyed in fee, the grantor reserving a term of seven years therein, and the grantee immediately reconveyed the same to the grantor in mortgage; and the mortgagee demised the premises to the mortgagor and another for seven years, reserving rent, it was held that the company was liable in case of a loss, notwithstanding such conveyances: *Stetson v. Massachusetts Ins. Co.*, 4 Mass. 330; S. C., 3 Am. Dec. 217. Where there is no clause forbidding alienation of the property, the executors of a deceased insured, in favor of whom the policy has been renewed after the death of the insured, may recover on the policy, though before the renewal they had conveyed the property insured, and taken back a mortgage for the purchase price: *Phelps v. Gebhard etc. Ins. Co.*, 9 Bosw. 404. But taking back a judgment for the balance of the purchase money due does not, as in case of a mortgage, vest an insurable interest in the vendor, and he can not recover on the policy. The judgment is a general, not a specific, lien: *Grevemeyer v. Southern etc. Ins. Co.*, 62 Pa. St. 340. A deed absolute upon its face may be shown by parol to have been given as collateral security, thus leaving an insurable interest in the grantor: *Tittmore v. Vermont Mut. Fire Ins. Co.*, 8 N. Y. 416.

An executory contract of sale does not defeat the policy, *Wheeling Ins. Co. v. Morrison*, 36 Am. Dec. 385, though part of the purchase money be received, if the title to the goods at the time of the loss remains in the person insured; and his right to recover will not be limited to the balance of purchase money remaining due: *Boston etc. Ice Co. v. Royal Ins. Co.*, 12 Allen, 381. But in a late English case the rule that insurance is a contract of indemnity is more strictly enforced. After a contract for the sale of a house, but before the completion of the purchase, the house was damaged by fire, and the insurance company, in ignorance of the contract, paid the vendors for the damage done. The purchase was afterwards completed, the vendors receiving the full amount of the purchase money. The insurance company was allowed to recover the amount of the insurance paid, on the ground that the contract of insurance being one of indemnity, the receipt of the purchase money by the defendants must be taken into account in estimating the loss sustained,

and as it extinguished the loss, the plaintiff was entitled to recover: *Castellain v. Preston*, 22 Am. Law Reg. 769, overruling S. C., Id. 168; S. C., 16 Rep. 573. If a mortgagor of a vessel sell his remaining interest therein, with a stipulation in the contract of sale that he will pay off the mortgage, and fails to comply with this stipulation, and the bargain is accordingly given up and the title reconveyed to him, a policy of insurance issued to him before his agreement of sale will then be valid to cover a loss: *Worthington v. Bearse*, 12 Allen, 382. A mere seizure of goods under execution does not divest the owner of his insurable interest, for the sheriff obtains no more than a special or qualified interest in the property: *Franklin Fire Ins. Co. v. Findlay*, 37 Am. Dec. 430. A vendor retains an insurable interest to the extent of the unpaid purchase money: *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 385; S. C., 30 Am. Dec. 90, and note. A vendor retaining possession of the goods by agreement of the parties, and holding the policies of insurance which he had previously procured thereon as collateral security for the payment of the residue of the purchase money thereon, retains an insurable interest in the goods to the extent of the unpaid purchase money: *Norcross v. Insurance Companies*, 55 Id. 571. The vendor of a steamboat has an insurable interest, and the fact that he has taken an invalid mortgage to secure the purchase price does not affect his interest: *Bell v. Western Mar. & F. Ins. Co.*, 5 Rob. (La.) 423; S. C., 39 Am. Dec. 542. The mere transfer of the legal title of a vessel does not extinguish a right to recover on a policy, if the party making the transfer still retain any right or interest in the vessel or her proceeds: *Gordon v. Mass. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 19 Id. 81. See the note upon the effect of alienation of insured property: *Lane v. Mutual Fire Ins. Co.*, 28 Am. Dec. 154.

CLASSIFICATION OF POLICIES CONTAINING CLAUSES IN RESTRAINT OF ALIENATION.—Such a classification is simple, for the policies of many insurance companies are quite similar. Five classes of policies may be made: 1. Those containing a clause in restraint of alienation, sale, or transfer of the property insured; 2. Those containing a clause restricting a transfer, change, or termination of the *interest* of the insured in the property insured; 3. Those containing a clause restricting any sale, transfer, or change in the *title* or *possession* of the property insured; 4. Those containing a clause restraining a sale or alienation of the insured property, *in whole or in part*; 5. Those containing clauses restricting certain *enumerated* alienations, transfers, changes, or incumbrances of the interest, title, or possession of the assured. Some policies contain two or more of these clauses, and would thus fall within two or more of these classes. But the decision of the court in each case is generally based upon the construction of one clause, and that the more stringent one. We propose to collect the authorities construing and defining these clauses, and to deduce the rules of construction applicable to each. It may be mentioned that most of these clauses permit the prohibited alienation, provided the insurance company is notified and give their consent. And the cases cited are cases where the alienation has been made without the company's consent, but a loss having occurred, the insured nevertheless seeks to recover his insurance.

CONDITION RESTRAINING ALIENATION.—If the assured retain an insurable interest, he may recover to that extent. The term "alienation" as applied to real estate has a technical signification, and any transfer short of a conveyance of the title is not an alienation: *Pollard v. Mut. Fire Ins. Co.*, 42 Me. 221; *Masters v. Madison etc. Ins. Co.*, 11 Barb. 624. Therefore, when the condition prohibits alienation or sale of the insured property, in order

that a breach of the condition may ensue, the entire interest of the insured must be absolutely and permanently divested: *Power v. Ocean Ins. Co.*, 36 Am. Dec. 665; *Cowan v. Iowa State Ins. Co.*, 40 Iowa, 551. To constitute a sale within a proviso against a sale or conveyance, the right to the property and to the possession must pass from the vendor to vendee: *Washington etc. Ins. Co. v. Kelly*, 32 Md. 421. And it is sufficient if the insured have an interest in the property insured at the time of the insurance and at the happening of the loss, though in the mean while his interest was divested: *Powers v. Ocean Ins. Co.*, 36 Am. Dec. 665. A mortgage is not an "alienation" of the property: *Pollard v. Mut. Fire Ins. Co.*, 42 Me. 221; *Conover v. Mutual Ins. Co.*, 3 Denio, 254; S. C., 1 N. Y. 290; *Rollins v. Columbian Ins. Co.*, 25 N. H. 200; *Folsom v. Belknap etc. Ins. Co.*, 30 Id. 231; *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418; S. C., 34 Am. Dec. 69; *Smith v. Monmouth etc. Ins. Co.*, 50 Me. 96. See *Wilson v. Hill*, 3 Met. 68, 71. A chattel mortgage is no "alienation:" *Rice v. Tower*, 1 Gray, 426. A surrender of possession of goods under a mortgage to the mortgagee will not fall within a prohibition against sale: *Washington Ins. Co. v. Hayes*, 17 Ohio St. 432. A mortgagor who released his equity of redemption, which was recorded, but took back a bond of defeasance, which was not recorded, was barred of a recovery, under a provision in restraint of alienation, for it appeared of record that there had been an alienation of the property, and under a provision by statute that an unrecorded bond in such case should not make the transaction a mortgage: *Tomlinson v. Monmouth etc. Ins. Co.*, 47 Me. 232. A trust deed of the insured property to secure payment of a note, although it is stipulated that the title should be in the trustee, creates under the Georgia code only a lien on the premises, and is not an "alienation of the property insured:" *Virginia Fire & Mar. Ins. Co. v. Feagin*, 62 Ga. 515. An executory or conditional sale is not an "alienation" of the property: *Trumbell v. Portage etc. Ins. Co.*, 12 Ohio, 305; *Tittlemore v. Vermont Mutual Fire Ins. Co.*, 20 Vt. 546; *Masters v. Madison etc. Ins. Co.*, 11 Barb. 624; *Washington Ins. Co. v. Kelly*, 32 Md. 421. A lease of the insured property is not an "alienation" within the prohibition: *Hobson v. Wellington etc. Ins. Co.*, 6 U. C. Q. R. 536; *Lane v. Maine Mut. etc. Ins. Co.*, 28 Am. Dec. 150. A sale by probate court is no "alienation" before confirmation of the sale: *Farmers' Mut. Ins. Co. etc. v. Graybill*, 74 Pa. St. 17. A levy of execution on the insured property is not an "alienation" while a right of redemption still remains to the assured: *Clark v. New England etc. Ins. Co.*, 53 Am. Dec. 44. A condition against sales of the property does not apply to a stock of goods kept for sale. The goods may be sold and replaced as often as the interests of the owner require, the policy meanwhile covering the stock on hand: *Wolfe v. Security etc. Ins. Co.*, 39 N. Y. 49. And this is the case generally under all forms of conditions when the insurance is effected on merchandise, since this property is continually changing hands in the course of trade. The policy will cover the stock remaining in the hands of the assured: See *infra*. Alienation of one of two houses insured in the same policy, but valued and insured separately, avoids the policy only as to the house so alienated, where the charter of the company provides that "the alienation of any property" shall avoid the "policy thereupon:" *Clark v. New England etc. Ins. Co.*, 53 Am. Dec. 44. Where the insured sells property insured, and afterwards takes it back on account of the non-payment of the vendee, and is in possession at the happening of the loss, he will recover: *Powers v. Ocean Ins. Co.*, 36 Id. 665; *Lane v. Maine Mut. etc. Ins. Co.*, 28 Id. 150. That a sale and mortgage back as security for the purchase price constitute an alienation of the property is hardly in consonance with the inter-

pretation of alienation as being a complete transfer of all the interest of the insured, nor is it consistent with authorities cited below holding the contrary under even more stringent provisions; yet this is held in *Tittlemore v. Vermont Mut. Fire Ins. Co.*, 20 Vt. 546. See also under this head the cases cited in the note to *Lane v. Maine Mutual Fire Ins. Co.*, 28 Am. Dec. 154-156.

CLAUSE RESTRICTING TRANSFER, CHANGE, OR TERMINATION OF INTEREST OF INSURED.—Under this clause, as under the clause of our first class, the generally accepted interpretation is that the whole interest of the insured must pass, and while an insurable interest remains he may recover. A clause restricting the transfer or termination of the interest of the assured will not cover a sale of an insured vessel when a mortgage is taken back by the seller: *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68. A foreclosure and sale unconfirmed does not work a forfeiture as long as it is inchoate. There was no change of title. It was not a "transfer of interest:" *Haight v. Continental Ins. Co.*, 92 Id. 51. Under a condition that the policy be void in case of a transfer or termination of interest, by sale or otherwise, of the property without the written consent of the insurers, the policy was not rendered void by an agreement for the sale of the premises under which the purchaser paid part of the purchase price and went into possession, thereby acquiring an equitable title; but the insured could only recover to the extent of the unpaid purchase money, with interest: *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. 247. And a mere nominal conveyance without an actual change of interest will not avoid the policy, though it contain a condition that the property shall not be sold or conveyed, or the interest of the parties therein changed. So an apparent absolute assignment of the interest of the insured may be shown by parol to be in fact an assignment for collateral security: *Ayres v. Home Ins. Co.*, 21 Iowa, 185. So a deed made by the insured, conveying the insured goods to assignees in trust to pay creditors, will not render such a policy void, the insured retaining the actual possession of the goods: *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9. A vendor of goods not delivered, but to be paid for upon delivery, has a lien on the property retained in possession for securing payment, and he is protected by an insurance upon the goods to the extent of his interest, notwithstanding a condition against a transfer or change of interest: *Aetna Ins. Co. v. Jackson*, 16 B. Mon. 242. But in *Bates v. Commercial Ins. Co.*, 2 Cin. 195, the court held that in a case where the possession of the insured goods was delivered to another under a sale, the condition was broken though the seller retained a lien for two thirds of the purchase price. A sale and mortgage back for the unpaid purchase money produced no "change of interest in whole or in part," in *Fernandez v. Great Western Ins. Co.*, 3 Robt. 457.

CLAUSE RESTRICTING ANY SALE, TRANSFER, OR CHANGE IN TITLE OR POSSESSION is perhaps the most stringent of all the clauses which are worded in general language. The court make a marked distinction between "change in title" and "change in interest," holding the former to be much the stronger provision of the two, while the latter is not effective unless after the transaction in controversy no insurable interest remain in the insured. "There is a plain distinction between those clauses which prohibit an alienation of the insurable interest and those which forbid any change of title or ownership:" *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 165; *Savage v. Howard Ins. Co.*, 52 N. Y. 502, 505, 506. Any material change in the title of the insured will under this provision avoid the policy and bar a recovery thereon: *Barnes v. Union Ins. Co.*, 51 Me. 110.

A mortgage, however, is maintained by the majority of authority to produce no change in the title. A mortgage or the mere creation of a lien or incumbrance upon the property can not effect "any change in the title:" *Loy v. Home Ins. Co.*, 24 Minn. 315; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164; *Byers v. Farmers' Ins. Co.*, 35 Ohio St. 606. A still stronger case is *Shepherd v. Union etc. Ins. Co.*, 38 N. H. 232. In that case, a provision that the policy should be void when the title should be changed "by sale, mortgage, or otherwise," was not effectual to make the policy void upon the mere execution of a mortgage before foreclosure; for title is not changed by the mere execution of a mortgage, which is a mere lien. Where the property was mortgaged at the time the insurance was given, the insured holding an equity of redemption, the execution of another mortgage to a different person, the proceeds of which were applied to the payment of the prior incumbrance and to other purposes, will not bring the policy within the condition of forfeiture in case of a sale, alienation, conveyance, transfer, or change of title: *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213. As long as the right of equity of redemption from a foreclosure of a mortgage remains, the condition against any change of title or possession is not broken: *Loy v. Home Ins. Co.*, 24 Minn. 315. A sale of real estate under execution, which had, however, not yet been perfected by deed, and on which the time for redemption by the judgment debtor had not yet expired when the loss occurred, produced no change "in the title or possession" within the meaning of the policy: *Hammel v. Queen's Ins. Co.*, 54 Wis. 72; S. C., 41 Am. Rep. 1. See *McLaren v. Hartford Ins. Co.*, 1 Edm. Sel. Cas. 210. But after the completion of the foreclosure the insured can not recover: *Bishop v. Clay*, 45 Conn. 430. But one who grants his property in fee to another, taking back to himself a life right to use and occupy the dwelling-house insured, not only changes in his title, but his insurable interest therein, and violates a condition against any sale, transfer, or change of title, although a mortgage would not have such an effect: *Farmers' Ins. Co. v. Archer*, 36 Ohio St. 608, 613, 614.

The court in *Edmands v. Mutual etc. Ins. Co.*, 1 Allen, 311, take a contrary view with regard to mortgages. In that case, under a provision against "all alienations and alterations in the ownership * * * in any material particular." A mortgage was held to be a material alteration, on the ground that, although a mortgage was not an alteration, it was an "alteration in the ownership. It alters it from a legal to an equitable ownership." But respecting this decision, it may be said that in many states a mortgage does not change the title from a legal to an equitable one, but is a mere lien upon the property, the legal title as before remaining in the mortgagor. In such states, then, the reasons of the Massachusetts case would not apply, and a mortgage would not be a violation of this clause.

Giving a chattel mortgage on the property is not a violation of the condition that the policy should be void "if the property be sold or transferred, or any change take place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance:" *Hennessey v. Manhattan Fire Ins. Co.*, 28 Hun, 98. This provision referred only to a complete change or transfer of the title: *Id.* Where the policy contained a general condition against alienation or change in title, and also provided that the entry of a foreclosure of a mortgage should be deemed an alienation, the giving of a chattel mortgage upon the assured property did not avoid the policy. Such a provision would apply only to an act which divested the title absolutely: *Van Deusen v. Charter Oak etc. Ins. Co.*, 1 Robt. 55. "I think the words 'change of title,' as used in this policy, should be construed to mean some act which divests

it absolutely, and thus permit the words 'the entry of the foreclosure of a mortgage' to have a natural and not a forced application:" *Per Bosworth*, C. J., Id. But in *Schumitsch v. American Ins. Co.*, 48 Wis. 26, a chattel mortgage was held to fall within the condition against "any subsequent change in the title."

A sale and mortgage back to secure unpaid purchase money is a change of title. In this case the legal title certainly vests in another, and the court is constrained to recognize the fact. This is settled in New York by *Savage v. Howard Ins. Co.*, 52 N. Y. 502. In that case the condition was, "if the property be sold or transferred, or any change take place in the title or possession." The court distinguishes the case of *Hitchcock v. Northwestern Ins. Co.*, 26 Id. 68. "The word 'property' was used here for the *corpus* of the thing insured, as distinguished from the interest of the insured in it. * * * In other policies other expressions widely different from this have been held to mean simply the insurable interest in the property or thing insured, as in *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68, the policy was to become void 'in case of transfer or termination of the interest of the assured in the property insured,' and it was held that so long as an insurable interest remained the policy was not avoided. * * * That case was decided upon the peculiar phraseology of the condition. The conditions before us are broader, and intended to provide against a transfer of title, or change in the title or possession, irrespective of any insurable interest that might arise or remain upon the change of title." In New York, previous to the decision in *Savage v. Howard Ins. Co.*, *supra*, the construction of this clause adopted in two cases had allowed a sale and mortgage back. Such a transaction was held to be no breach of a condition against change of title or property, in *Kitts v. Massachusetts Ins. Co.*, 56 Barb. 177; the court relying upon *Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68, and perceiving no distinction between "change in title" and "transfer of title." In this latter case the word "title," it will be remembered, was not used in the condition, but the word "interest." The same proposition is held in *Savage v. Long Island Ins. Co.*, 43 How. Pr. 462. Though called to the attention of the court, neither of these cases are noticed in the opinion in *Savage v. Howard Ins. Co.*, *supra*, which, however, virtually overrules them. A "change in the title" is effected by a conveyance by the assured though he took back a bond for a deed: *Foote v. Hartford Ins. Co.*, 119 Mass. 259. A mere executory contract of sale, however, without change of possession, is not a sale or transfer, or any change in title or possession, within the provision of the policy. Such a provision contemplates a legal transfer which divests the insured of title to or control over the property: *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Hill v. Cumberland etc. Protection Co.*, 59 Pa. St. 474. An assignment of the insured property as collateral security is not a "sale, transfer, or change of title" within the meaning of the policy: *Ayres v. Hartford Ins. Co.*, 21 Iowa, 193; S. C., 17 Id. 176; but the condition would be broken by a transfer that would increase the temptation on the part of the insured to defraud the insurer. The policy will be avoided by a conveyance absolute in form but given as security for a debt merely. In such a case, the conveyance of an undivided interest will avoid the policy: *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279. A sale of an undivided half-interest avoids the policy under such a condition: *McEwan v. Western Ins. Co.*, 1 Mich. N. P. 118. And where partition was made of property in which an undivided interest had been insured, upon the application of the co-tenant of the insured, it was such a material change in the title of the property insured as would avoid a

policy containing a condition in restraint of alienation or change of title in the property insured: *Barnes v. Union etc. Ins. Co.*, 51 Me. 110.

A lease of the insured property produces no change in the title or possession: *Rumsey v. Phoenix Ins. Co.*, 17 Blatchf. 527; *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289. Where the insured made an oral executory contract to lease the property, and during the term of the insurance the intended lessee entered into the actual possession of the premises under a parol license for the purpose of making repairs, there was no change of possession within a prohibition against a change in title or possession: *Alkan v. New Hampshire Ins. Co.*, 53 Wis. 136. A condition against "any transfer, partial transfer, or change in title in the property" is not violated in the case of merchandise, a part of which is sold. Merchandise is to be used for traffic and commerce, and is not as property to be kept unchanged: *West Branch Ins. Co. v. Helfenstein*, 40 Pa. St. 289; *Biggs v. North Carolina Home Ins. Co.*, 88 N. C. 141. A mere agreement between insured and another that the property shall be represented as belonging to the latter in order to prevent attachments by the creditors of the insured is not a "sale, transfer, or change of title" within the provision of the policy: *Orrell v. Hampden etc. Ins. Co.*, 13 Gray, 431.

CLAUSES RESTRAINING SALE OR ALIENATION IN WHOLE OR IN PART.—This clause is aimed at those decisions which hold that the condition restricting simply an alienation or sale of the property include those cases only where the whole title and interest of the insured is conveyed or passes out of him. Under this condition, it is not necessary that there should be an absolute transfer of the whole or any distinct portion of the property. If there has been such a disposition of it that any property has passed to another, it is enough: *Abbott v. Hampden etc. Ins. Co.*, 30 Me. 414. It is more stringent. Thus a mortgage effects a breach of such a condition: *Pollard v. Mut. Fire Ins. Co.*, 42 Id. 221. But it would hardly do so if the mortgage were a mere lien, for then not even a partial alienation takes place. A sale with a simultaneous mortgage back for the unpaid purchase money is a sufficient alienation to avoid the policy under such a condition: *Abbott v. Hampden etc. Ins. Co.*, 30 Me. 414. But a mere contract for sale and future delivery, not divesting the title of the vendor, is not a breach of the proviso: *Kempton v. State Ins. Co.*, 17 N. W. Rep. 194. If the legal title passes, however, or only a contingent interest remains in the insurer, the policy will be avoided. Thus a conveyance of the insured premises by a husband, by warranty deed, to a person who at the same time and as a part of the same transaction conveys the premises to the grantor's wife, avoids a policy which contains a provision that it shall become void if the insured premises are "sold or conveyed in whole or in part," although the husband retains an interest in the land as tenant by curtesy: *Oakes v. Manufacturers' etc. Ins. Co.*, 131 Mass. 164. In *Strong v. Manufacturers' etc. Ins. Co.*, 10 Pick. 40; S. C., 20 Am. Dec. 507, the policy contained a condition against a sale or conveyance of the property in whole or in part; but an insured mortgagor, whose equity of redemption had been seized and sold on execution, retained an insurable interest until his right to redeem the equity was lost, and he might until then recover the amount of damage to the property, not exceeding the sum insured.

CLAUSES RESTRICTING CERTAIN ENUMERATED ALIENATIONS.—The policy may by express words prohibit the mortgaging of the insured property. In such case, a mortgage will of course be a breach of the condition and an avoidance of the policy: *Eden v. Hamilton etc. Ins. Co.*, 3 Allen, 362. Where there is a provision against incumbrances as well as against a transfer or

change in the title, the execution of a mortgage on the insured property will avoid the policy: *Ellis v. State Ins. Co.*, 16 N. W. Rep. 744. When the policy contains a stipulation avoiding it in case the insured mortgages the property without notifying the secretary, a mortgage of a portion only of the property insured, the contract of insurance being entire, avoids the whole policy: *Plath v. Minnesota etc. Ins. Co.*, 23 Minn. 479. Under a policy of insurance requiring notice to be given to the company of a mortgaging of the property, a delay in giving such a notice for fifty days is unreasonable and avoids the policy: *McGowan v. People's etc. Ins. Co.*, 54 Vt. 211. But in *Allen v. Hudson River etc. Ins. Co.*, 19 Barb. 442, under a condition voiding the policy if any incumbrance should fall upon the property insured sufficient to reduce the real interest of the insured to a sum only equal to or below the amount insured, a mortgage was no violation of the condition. For, "assuming that such a mortgage may be an incumbrance within the meaning of the condition, which I think may well be doubted, I am unable to see how the real interest of the insured in the property incumbered has been reduced by means of the mortgage. * * * The only effect of the mortgage was to enable the mortgagees instead of the mortgagors to dispose of the property and apply the proceeds to the payment of the debts of the mortgagors: *Per Harris, J.*, Id. 446. A condition in a policy that it shall cease from the time that the property insured shall be "levied on or taken into possession or custody under an execution or other proceeding in law or equity," does not apply to a wrongful levy made upon the property as that of another person: *Philadelphia etc. Ins. Co. v. Mills*, 44 Pa. St. 241. So a condition that the entry of a foreclosure of mortgage shall be deemed an alienation does not involve an invalid judicial sale afterwards set aside: *Georgia Home Ins. Co. v. Kinnier*, 28 Gratt. 88.

Where a policy enumerates changes in title in particular ways, by which it is to be avoided, a change otherwise made can not have this effect, where at least it does not amount to an alienation of the property. In such a case, a chattel mortgage, under which no possession had been taken by the mortgagee, and the sum secured by which was not due at the time of the loss, produced no forfeiture: *Judge v. Connecticut Fire Ins. Co.*, 132 Mass. 521. See also upon this subject the note to *Lane v. Maine Mutual Fire Ins. Co.*, 28 Am. Dec. 154.

FAILURE OF INSURED TO DISCLOSE NATURE AND EXTENT OF HIS INTEREST: See *Smith v. Columbia Ins. Co.*, 55 Am. Dec. 546, and note 550; *Gates v. Madison County M. Ins. Co.*, Id. 360; *King v. State M. F. I. Co.*, 54 Id. 692; *Clark v. N. E. M. F. I. Co.*, 53 Id. 44, and note citing prior cases.

CONTRACT OF INSURANCE IS ONE OF INDEMNITY: See *McDonald v. Black*, 55 Am. Dec. 448; *Glendale Woolen Co. v. P. I. Co.*, 54 Id. 309, and notes citing prior cases.

THE PRINCIPAL CASE IS CITED in *Obermeyer v. Globe Mut. Ins. Co.*, 43 Mo. 573, as holding the same doctrine as *Powers v. Ocean Ins. Co.*, 19 La. 28; S. C., 36 Am. Dec. 665, which decided that when the insured property was taken back after sale upon non-payment of the purchase money, the policy was good notwithstanding a stipulation for forfeiture of the policy in case of a sale, though in the principal case it was not necessary to go so far.

NEUER v. O'FALLON.

[18 MISSOURI, 277.]

TREASURER OF CORPORATION IS NOT LIABLE TO GARNISHMENT ON DEBT OF CORPORATION, as the funds of the corporation are not at his individual disposal.

DIRECTION BY CORPORATION TO ITS TREASURER TO PAY MONEY to defendant in attachment suit as a mere donation will subject neither the corporation nor its treasurer to garnishment.

GARNISHMENT process was issued against O'Fallon by Neuer, the plaintiff, in a suit against Radford & Mallory. The plaintiff alleged that the garnishee was, at the time he was summoned, the treasurer of the Illinois Coal Company, and held in his hands a sum of money which he had been directed by the company to pay to the defendants, who were contractors. The garnishee denied that he had any money of the defendants in his hands, either as treasurer or individually; and alleged that some time prior to this suit Radford & Mallory entered into a contract with the coal company, which they forfeited by abandoning it before completion; that before the service of the garnishment the company paid the defendants more than they were legally entitled to receive; that the company, for the reasons which are stated in the opinion, directed the garnishee to pay the defendants an additional sum of money, which was a mere donation from the company; and that he paid the money in accordance with the authority and direction of the company after the service of the garnishment. The garnishee was discharged upon his answer.

C. B. Lord, for the plaintiff in error.

C. C. Simmons, for the defendants in error.

By Court, RYLAND, J. The only question in this case involves the correctness of the judgment of the court below in discharging O'Fallon, considering him not liable. Let us consider this question. The answer of O'Fallon, which is not excepted to or denied, shows that he was not indebted to the defendants in the attachment. He held in his hands the funds of a corporation as its treasurer. These funds were not at his disposal individually; they were received and receipted for in the name of the corporation; they were paid out only by the orders and directions of the corporation through the checks of their treasurer, O'Fallon. The corporation was not garnished. In the opinion of this court, O'Fallon was properly discharged.

It seems that the corporation owed the defendants nothing; they had abandoned their contract; they owed their workmen, and the company, fearing that their workmen might do some injury or damage to the property belonging to the company, resolved to give to the defendants in the attachment suit money enough to pay their hands for the work, in order that the hands might be satisfied, and not injure the property of the company on account of what they might consider bad treatment of the defendants to them in not paying for their labor. This sum was a mere donation on the part of the company, prompted in self-preservation. It was made for the benefit of the workmen. This money was paid to the defendants through the check of the treasurer. There are no grounds on which, as appears by the answer, this process of garnishment can be maintained against O'Fallon.

The judgment of the court below must be affirmed, and with the concurrence of the other judges, is affirmed.

GARNISHMENT, MUNICIPAL CORPORATION NOT LIABLE TO, in favor of creditor of one of its officers: *Hawthorn v. St. Louis*, 47 Am. Dec. 141; and note to *Divine v. Harvie*, 18 Id. 200.

GARNISHMENT AGAINST DEBTOR OF CORPORATION IS DISSOLVED BY CIVIL DEATH OF CORPORATION, produced by forfeiture of its charter: *Farmers' & M. Bank v. Little*, 42 Am. Dec. 293.

COUNTY TREASURER IS NOT LIABLE TO PROCESS OF GARNISHMENT upon debt due from the municipal corporation. The principal case is cited to this effect in *Wallace v. Sawyer*, 54 Ind. 506.

ROPER v. CLAY.

[18 MISSOURI, 383.]

PREVIOUS CONTRACT TO MARRY EXISTING BETWEEN PLAINTIFF AND THIRD PERSON is no defense to an action for breach of promise of marriage, nor is it admissible in mitigation of damages.

APPELLATE COURT WILL NOT DISTURB VERDICT ON GROUND OF INSUFFICIENCY OF EVIDENCE, when there is evidence tending to support it.

GENERAL PRINCIPLE OF AIDING DEFECTS IN PLEADING BY INTENDMENT AFTER VERDICT is, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required proof on the trial of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict.

OMISSION TO AVER DEFENDANT'S PROMISE TO MARRY, in count for breach of promise of marriage, is cured by verdict, where there is an averment that "the plaintiff promised to marry the defendant at the special instance and request of the defendant," and a subsequent averment "that the defendant, not regarding his said promise and undertaking."

SEDUCTION AND IMPREGNATION CONSTITUTE NO CAUSE OF ACTION against the seducer in behalf of the party seduced.

COUNT FOR BREACH OF PROMISE OF MARRIAGE IS NOT AFFECTED by count for seduction joined with it, and the latter may be disregarded under a practice act allowing the plaintiff to join as many different causes of action as he may have against the defendant.

ADMISSION OF EVIDENCE ON COUNT NOT GOOD IN LAW is not ground for arrest or reversal of the judgment, when the evidence might have been given under another good count of the declaration.

ADMISSION OF EVIDENCE UNDER COUNT FOR SEDUCTION in action for breach of promise of marriage is not ground for the arrest or reversal of the judgment, for this evidence could properly have been admitted under the count for the breach of promise in aggravation of damages.

ERROR to Wright circuit court. The opinion states the case.

McBride and Edwards, for the plaintiff in error.

F. P. Wright, for the defendant in error.

By Court, RYLAND, J. The plaintiff, Roper, filed her petition in the Wright circuit court, in March, 1852, against the defendant, Clay. The petition contained three counts, setting forth three causes of action against the defendant: the first count was for a breach of promise of marriage; the second was for seduction and getting the plaintiff with child; the third was for malpractice as a physician, whereby the plaintiff's health was greatly impaired, etc. The defendant filed his answer denying the matters charged in the plaintiff's petition. He denied that he ever promised to marry the plaintiff; denied that he ever seduced the plaintiff, or that he ever had carnal knowledge of the plaintiff; denied any malpractice by him as a physician upon said plaintiff; and denied all the material charges contained in plaintiff's petition. At the May term of the court, in the year 1853, the cause was tried, and the jury found the issues upon the counts for breach of marriage and seduction for the plaintiff, and the issue upon the count for malpractice for the defendant, and assessed the plaintiff's damages at one thousand dollars.

The defendant moved for a new trial, which being overruled, he excepted. He also filed his motion in arrest of judgment, which was overruled, and defendant excepted and filed his bill of exceptions, and brings the case here by writ of error.

The questions necessary for the consideration of this court

arise principally upon the motion in arrest of judgment. The plaintiff in error, however, complains of the ruling of the court, in refusing to permit him to prove that, at the time spoken of by the witnesses of the promise to marry between plaintiff below and the defendant, she, the plaintiff below, was engaged to marry a third person. The plaintiff in error contends that if such contract to marry a third person did exist, the subsequent contract with him was null and void, and the plaintiff below had no right to complain of a breach thereof; and at least that such evidence should have gone to the jury in mitigation of damages. He also contends that the evidence given did not warrant the jury in finding their verdict. I have mentioned these points to let the plaintiff in error see that they did not escape our consideration. There is nothing in them requiring the interference of this court. The existence of a promise on the part of the plaintiff below to marry a third person can not avail the plaintiff in error. He was in no manner affected thereby. His intervention though, at such a time, and promise to marry, and his subsequent conduct, as found by the jury, surely ought not, in the minds of any intelligent jurors, to have the effect of mitigating the damages sustained by his victim.

As to the evidence not being sufficient to warrant the verdict of the jury, this was a matter for their consideration. There was evidence tending to support the charges in the petition of the plaintiff, at least the charges in the first and second counts, and the jury having found their verdict for the plaintiff below, this court will not disturb it on the ground of sufficiency or insufficiency of evidence.

Upon the motion to arrest the judgment below, a much more important question arises, which will now be investigated. The first count in the plaintiff's petition alleges the breach of the promise to marry. The second count charges the seduction of the plaintiff and her impregnation by the defendant. The second count contains no cause of action to the plaintiff; she can not allege her seduction and her impregnation against her seducer as a cause of action in her own name. This count, therefore, is wholly insufficient in itself to support a judgment after verdict.

The first count attempts to set forth the promise to marry and the breach of the promise. This count is very defective; it is drawn with too much haste and with too little attention to the rules of pleading. A demurrer would have been sustained to it had one been filed; but as there was an answer put into

this count denying the charges made therein, and a verdict upon the issue made on it by the jury in favor of plaintiff, it becomes important to see if the judgment can be maintained by the effect which the verdict in this case must have.

This count is in these words: "The plaintiff states that on the first day of December, in the year of our Lord eighteen hundred and fifty, at the county of Wright aforesaid, in consideration that the said plaintiff being then and there *sole* and unmarried, at the special instance and request of the said defendant, had then and there undertaken and faithfully promised the said defendant to marry him, the said defendant, on the first day of January, A. D. 1851; and on the said first day of January, A. D. 1851, the said defendant postponed the time of the marriage ceremony until the last of said month of January, A. D. 1851, to wit, on the twenty-second day of January, 1851; at that time the said defendant, under some pretext, postponed the performance of the marriage ceremony from time to time, until some time in next April following, to wit, on the twenty-fourth day of April, A. D. 1851, and when the time came, the said defendant refused to marry the said plaintiff at that time; and afterwards, the said defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and injure the said plaintiff in this behalf, after the making of his said promise and undertaking, to wit, at the several times aforesaid, at the county aforesaid, wrongfully and injuriously married a certain other person, to wit, one Martha Bowlin, contrary to his said last-mentioned promise and undertaking so by him made as aforesaid, by which the said plaintiff has sustained damage to the amount of two thousand dollars, for which she asks judgment."

The pleader has failed to aver a promise by the defendant to marry in consideration of the plaintiff's promise. He states that "the plaintiff promised to marry the defendant at the special instance and request of the defendant." Upon the subject of marriage, such a promise thus made would necessarily be mutual. The pleader afterwards avers "that the defendant not regarding his said promise and undertaking." Here was a mere omission to insert the averment of the defendant's promise. From the count as made, it can not but appear that the plaintiff had a cause of action, but this cause of action was defectively set forth. Now, will the verdict cure this defect? Defects in pleading are sometimes aided by what is called "intendment after verdict."

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The general principle upon which this doctrine depends appears to be that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required proof on the trial of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict: 1 Ch. Pl. 712; *Stennel v. Hogg*, 1 Saund. 228, note 1, and authorities therein cited.

In the case of *Daniel v. Holland*, 4 J. J. Marsh. 20, Chief Justice Robinson, in delivering the opinion of the court, uses this language: "It is a rule of pleading established by the common law, because it is a dictate of common sense, that after verdict it will be intended that everything was proved without proving which there could not have been a verdict for the party; provided the declaration contain a general allegation of a cause of action, defective only in some circumstance or fact which may be embraced by it and inferred from it." In the same opinion the judge says the "omission to aver possession in a declaration for trespass by the owner would be cured by verdict."

"If the plaintiff shows a good title, however defectively he may have set it out, the verdict cures it. There might be vices in the declaration, fatal defects on special demurrer, but there is a healing virtue in a verdict which cures everything but mortal diseases—all but radical, constitutional defects:" *Shaw v. Redmond*, 11 Serg. & R. 30.

A declaration in an action upon an award, which alleged no promise of the parties to perform the award, was held good after verdict: *Kingsley v. Bill*, 9 Mass. 198; see also *Bemis v. Faxon*, 4 Id. 265. Upon motion in arrest of judgment for the fault of the declaration laying the promise on a day which was yet to come, the court observed that "there should have been a special demurrer; that it was well enough after verdict, which could not have been found for the plaintiff but on evidence of a promise made before the action, and a duty before the promise."

The plaintiff below showed that she had a good cause of action against the defendant, in the manner she set it forth in the first count of her petition; it was defectively set forth—informally set forth; yet the defendant could not but see and know what she alleged against him; he was fully apprised that the promise of marriage theretofore made to her by him, and the

breach of that promise, was the foundation and gist of the plaintiff's action. He denies this alleged promise. He also moves the court below, as it appears from the record, to exclude from the jury the evidence of this promise offered by the plaintiff. There was proof of the promise, and the intendment of the law that there must have been such proof before the jury would have found their verdict is supported, in this case, by the record itself that there was such proof in reality before them. In the opinion of this court, then, the first count in the plaintiff's petition is sufficient, after verdict, to support the judgment.

Under our present practice act, the plaintiff is permitted to join as many different causes of action in her petition as she may have against the defendant. The count, then, for the breach of the marriage contract is not affected by the count for seduction. The count for seduction may be disregarded altogether—stricken out from the case. But the plaintiff in error says that evidence was offered to the jury in support of this second count, the count for seduction, and that such evidence increased the amount of damages for which the verdict was rendered in this case, and consequently the judgment should have been arrested; but such is not the opinion of this court. The first count, being good after verdict, will support this judgment, and the plaintiff in error has no cause of complaint; for the evidence given under the second count could very properly have been admitted on the first count. All the evidence, therefore, given in the case below on both counts could have been given on the first count: See *Green v. Spencer*, 3 Mo. 319 [26 Am. Dec. 672]; and consequently there has been no injury done to the defendant by the admission of evidence on a count not good in law. Upon the whole of the case, as it appears to the court by the record of the court below, it is the opinion that the judgment of the court below be affirmed.

SCOTT, J., concurred.

GAMBLE, J., not sitting, by reason of indisposition.

WHO MAY SUE FOR SEDUCTION: See note to *Bartley v. Richtmeyer*, 53 Am. Dec. 347, and note to *Weaver v. Bachert*, 44 Id. 165; see also *Palmer v. Oakley*, 47 Id. 41. The principal case is cited in *Jordan v. Hovey*, 72 Mo. 576, to the point that a woman can not maintain an action for damages against her seducer.

SEDUCTION, ADMISSIBILITY OF EVIDENCE OF, IN ACTION FOR BREACH OF PROMISE OF MARRIAGE TO AGGRAVATE DAMAGES.—In *Weaver v. Bachert*, 44 Am. Dec. 159, it is held inadmissible for this purpose, but in the note to that case, page 178, it is said: "It is well settled, contrary to the doctrine

of the principal case, that in an action for breach of promise of marriage, evidence of seduction is admissible in aggravation of damages;" and the prior cases in this series and other cases are cited.

BREACH OF PROMISE OF MARRIAGE, ACTION FOR AND EVIDENCE IN: See *Kelly v. Renfro*, 44 Am. Dec. 441, and note 444; *Weaver v. Bachert*, Id. 759, and note citing prior cases 179; *Munson v. Hastings*, 36 Id. 345, and note 347.

INSUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT CAN NOT BE ASSIGNED AS ERROR, unless the record shows that it contains all the evidence, and that a motion for a new trial was made and overruled: *Richardson v. St. Joseph Iron Co.*, 33 Am. Dec. 460. Decision of trial court on questions of fact is final, and can not be examined into on exceptions: *Strong v. Barnes*, 34 Id. 684; see *People v. Haynes*, 28 Id. 530.

DEFECTS CURED BY VERDICT.—The distinction between defects in pleading which are fatal after verdict and those which are not lies in the omission of a statement of facts which are the gist of the action in one case and an imperfect statement of facts in the other: *Anderson v. Read*, 5 Am. Dec. 661. Therefore a verdict will not cure a want of a cause of action in the declaration: *Irvine v. Bull*, 28 Id. 708; *Austin v. Whitlock*, 4 Id. 550; *Chichester v. Vass*, 1 Id. 509; and see *Truss v. Old*, 18 Id. 748. Mere technical defects in the declaration, however, furnish no ground for setting aside the verdict where a cause of action is sufficiently stated: *Baldwin v. O'Brien*, 1 Id. 208; *Miles v. Oldfield*, 2 Id. 412. Where an infant sues by guardian, an omission to state that the guardian was admitted by the court is cured by verdict: *Kid v. Mitchell*, 9 Id. 702. Where an act which the plaintiff was bound to perform within a reasonable time is alleged to have been done within a reasonable time, to wit, on or about such a day, it is sufficient after verdict: *Nichols v. Blakeslee*, 2 Id. 95. After verdict, the allegations of fraud and deceit in the declaration are equivalent to the charge of an actual *scienter*: *Osgood v. Lewis*, 18 Id. 317. Omission to allege that tort complained of against a corporation was without the scope of its powers is cured by verdict: *Chestnut Hill T. Co. v. Rutter*, 8 Id. 675. Omission of the allegation of special demand is cured by verdict: *Bliss v. Arnold*, 30 Id. 467. An allegation that "his store" was consumed by fire, though not a technical averment of ownership, is good after verdict: *Lane v. Maine Mut. Ins. Co.*, 28 Id. 150. So of an omission to allege value: Id. So of an omission to state the amount of damages in the declaration: *Hargrave v. Penrod*, 12 Id. 201.

TANNER v. STINE.

[18 MISSOURI, 590.]

SHERIFF'S DEED IS VOID WHICH RECITES THAT LAND WAS EXPOSED FOR SALE "at the court-house door in the city of St. Louis, during the ——— term of the ——— court of ———, for the year eighteen hundred and forty ———," under a statute requiring the officer to expose real estate taken under execution to sale at the court-house door on some day during the term of the circuit court for the county where the same is situated, and requiring that the sheriff's deed shall recite the time, place, and manner of the sale.

AUTHORITY OF SHERIFF IN SALES OF REAL ESTATE depends on the judgment and execution, and the compliance with certain acts which, for the protection of debtors, the law requires to be performed previous to the sale.

SHERIFF'S DEED MUST RECITE FROM FACTS ENUMERATED BY STATUTE prescribing its contents, at least those facts the non-performance of which would render the sale void.

PURCHASER AT SHERIFF'S SALE MAY REJECT SHERIFF'S DEED as not in compliance with law, and his acceptance of it is his own voluntary act, in the performance of which he has a right to control and direct the officer, and he is therefore not entitled to the protection afforded a purchaser in good faith, on the reasonable presumption that the law has been complied with by those intrusted with its execution, and over whose acts he has no control.

Civil action by Edwin Tanner against Emily Stine to recover the legal title to a tract of land. The plaintiff's claim rested upon a deed from one Chambers, who purchased the land at a sheriff's sale and received a sheriff's deed. The sale was under an execution against Jacob R. Stine. The deed recited the manner of the sale as stated in the opinion. The defendant's claim was based upon a deed from one Prather, to whom Jacob R. Stine, the defendant's husband, had conveyed the property before the rendition of the judgment under which the property was sold. The plaintiff attacked the deeds of Stine and Prather as fraudulent and without consideration. The cause was submitted to the jury by the court below upon the question of fraud, the court refusing an instruction that the sheriff's deed passed no title by reason of its non-conformity to the requirements of the statute. The verdict being for the plaintiff, the defendant brought error.

E. & B. Bates, for the plaintiff in error.

F. A. Dick and F. P. Blair, jun., for the defendant in error.

By Court, SCOTT, J. This cause will turn upon the sheriff's deed executed to Chambers, under whom Tanner, the plaintiff below, claims. A great deal was said in the argument, and many cases were cited, to show the length that this and other courts have gone in support of sales made under judicial process. But the precise point involved in this litigation we are not aware has ever been decided by this tribunal. The deed of the sheriff to Chambers recites that, agreeably to an advertisement accompanying the deed, at the court-house door in the city of St. Louis, during the — term of the — court of —, for the year eighteen hundred and forty —, he exposed to sale, etc.

The thirty-eighth section of the act concerning executions (R. C. 1835) enacts that when real estate shall be taken in execution it shall be the duty of the officer to expose the same to sale at the court-house door, on some day during the term of the circuit court for the county where the same is situated, having previously given twenty days' notice of the time and place of sale, etc. The forty-fifth section of the same act makes it the duty of any officer who shall sell any real estate to make to the purchaser a deed, to be paid for by the purchaser, reciting the names of the parties to the execution, the date when issued, the date of the judgment, and other particulars, as recited in the execution; also a description of the property, the time, place, and manner of sale, which recital shall be received as evidence of the facts therein stated.

When judicial proceedings have been assailed for irregularity, with a view to destroy titles acquired under them, the courts have all been liberal in intendments for their support. So likewise great indulgence has been shown to the acts of officers in the sale of lands under judgments and decrees, when the party relying on those acts was not aware of the irregularity, and had no control of the officers in their performance. It will not be maintained that the sale by the sheriff of real estate under a judgment is the execution of a statutory power, and that his authority must be strictly pursued in order to render the sale valid. This is the principle applicable to the sale of collectors for the non-payment of taxes. But the authority of the sheriff, in sales of real estate, depends on the judgment and execution, and the compliance with certain acts which for the protection of debtors the law requires to be performed previous to the sale.

Cases with respect to recitals in sheriffs' deeds have been cited from the Ohio reports. These are *Armstrong v. McCoy*, 8 Ohio, 128 [31 Am. Dec. 435], and *Perkins v. Dibble*, 10 Id. 433 [36 Am. Dec. 97]. In the first of these cases, the objection to the deed was, that it did not recite all the executions that issued upon the judgment before the sale was effected. This objection was not maintained. The court held that it was only necessary that the deed should show that the sheriff acted under the execution. It was observed that this question had been frequently raised in New York, and it had been uniformly decided in favor of the sheriff's deed. In the last of the above-cited cases, it was said that "the law regulating judgments and executions requires that the 'deed of conveyance to be made by

the sheriff or other officer shall recite the execution or the substance thereof, and the names of the parties, the kind of action, the amount and date of term of the rendition of each judgment by virtue whereof the lands and tenements were sold,' etc. The deed in the present case recites the execution and the names of the parties as therein stated, but in referring to the judgment does not again recite their names, neither does it state the amount of the judgment, except as it appears upon the execution. It recites sufficient to show that the officer had authority to sell, and this we hold all to be necessary." The case of *Armstrong v. McCoy*, *supra*, was cited in the support of the opinion. This last case, we have seen, rests upon the authority of decisions in New York. Now, this is a fair illustration of the danger of construing the statutes of one state by reference to principles in other states founded on statutes with which we are unacquainted.

The cases in Ohio are founded on the principle that recitals are no necessary part of a deed, and the books of New York are used in its support. The proposition may be correct as an abstract one. As to the materiality of recitals in a deed executed by a sheriff, we will recur to the subject hereafter. The sixty-second section of the second article of the act concerning executions (New York revised laws) prescribes that after the expiration of fifteen months from the time of the sale of any real estate, if any of the premises shall remain unredeemed by the person entitled to redeem the same within one year from the time of such sale, then the officer making such sale shall complete the same by executing a conveyance of the premises so remaining unredeemed; which conveyance shall be valid and effectual to convey all the right, title, and interest which was sold by the sheriff. So it appears that the New York statute is silent as to the recitals to be contained in a deed. Hence in the case of *Jackson d. Martin v. Pratt*, 10 Johns. 381, which is one of the cases relied on by the court of Ohio, it was held that where there was a variance between the sum mentioned in the judgment roll of the total amount of damages, it was not material, the clause of *in toto se attingunt* being only a clerical addition, and no part of the judgment. The recital of the execution in a sheriff's deed is not necessary, and a mistake or variance in the recital is not material, and does not affect the validity of the deed, so long as there was an existing and sufficient authority to the sheriff to warrant the sale. To the same purpose is the case of *Jackson v. Streeter*, 5 Cow. 530. The cases of *Den d.*

Hattan v. Dew, 3 Murph. 260, and *Cherry v. Woolard*, 1 Ired. L. 438, maintain that where a sheriff sells under a valid execution, it is no objection to the title of the purchaser that in his deed of conveyance he misrecites the execution. It does not appear from these cases that there is any statute on the subject in that state, and as no allusion is made to it, we may infer that none exists. The case of *Doe d. Wilkins v. Rue*, 4 Blackf. 263 [29 Am. Dec. 368], holds that a sheriff's deed may be admissible in evidence, though it recites incorrectly the amount of the execution under which the sale was made, a particular recital of the execution not being necessary to the validity of the sale. This case refers to *Jackson d. Martin v. Pratt*, 10 Johns. 381, above recited, as an authority in support of it. Upon examination, it will be found that the statute of Indiana on the subject of sheriffs' deeds is silent as to the matter which shall be contained in them. It merely enacts that the sheriff shall execute a deed. The case of *Sneed v. Reardon*, 1 A. K. Marsh. 217, maintains that though a deed under a sheriff's sale may not recite literally the execution under which the sale was made, yet if there was enough to ascertain the execution, the title will pass to the purchaser. In Kentucky, the statute requires that the deed of the sheriff shall recite the execution, purchase, and consideration: Morehead & Brown's Rev. Laws, 1463. So all these cases merely maintain that a misrecital of an execution in a sheriff's deed will not avoid the conveyance, and most of them arose in states where the statutes were silent as to the form of the deed to be executed to the purchaser.

The case of the *President and Selectmen of Natchez v. Minor*, 10 Smed. & M. 244, which is so frequently referred to with a view to show the liberality in which courts indulge in order to uphold titles acquired at sheriffs' sales, decides that a total omission of the sheriff to give the notice, or his giving it in a mode entirely different from that prescribed by law, will not affect the title of a *bona fide* purchaser of real estate under execution who has no knowledge of the misconduct of the officer.

The invalidity of the deed involved in this controversy may be maintained without impugning the authority of any of the above-cited cases. Upon an examination of the statute of Ohio, above cited, it will be found that it requires the recitals of the judgments and executions and various matters of form which in no wise can affect the sale for good or for evil, so far as the debtor or purchaser is concerned. The interpretation it has received is, that it is directory beyond what was necessary to show

that the sheriff had authority to act. Our statute goes further, and not only requires the recital of the authority to sell, but also of the performance of other acts which were necessary to make a valid sale. It requires that a sheriff's sale shall be made during the term of the circuit court. This was for an obviously wise purpose. The deed must recite the time, place, and manner of sale; and the recital of these facts in the deed is made the evidence that the law has been complied with. It was contemplated that the deed, upon the face of it, should show that the sale had been made at such a time as the law supposed would produce the most beneficial result. The recital of the mere day of sale would not satisfy the law, without showing that the day was during the term of the circuit court. This has been the uniform practice in this state. Then, without undertaking to say what recitals are directory and what essential, we may safely declare that the recital of those of the enumerated facts, the non-performance of which would render the sale void, is necessary.

If a sale was made at a time other than during the term of the circuit or other court required by law, there can be no question that a purchaser taking a deed under such a sale would not be permitted to recover the land intended to be conveyed by it. The sheriff, in making a conveyance, is not disposing of his own property. He is selling the property of a debtor *in invitum* for the benefit of the creditor. The sale is required to be made under circumstances which the law deems most advantageous to all concerned. The deed is required to be made in such a way as must show that this has been done. The purchaser is bound to pay the expenses of the deed. He might have prepared it, or at least have rejected it, as not being in compliance with the law. His acceptance of it is his own voluntary act—an act in the performance of which he had a right to control and direct the officer. These considerations distinguish this case from those in which a purchaser takes a title in good faith, on the reasonable presumption that the law has been complied with by those intrusted with its execution, and over whose acts he has no control. Under such circumstances, the purchaser will be protected, and to this extent have the cases gone which have been determined in this and other courts.

We are sufficiently impressed with the importance of upholding titles acquired at sheriffs' sales. A well-grounded confidence in their validity will prevent sacrifices of property; but considerations of this kind would always be urged with a better

grace by those who themselves have imparted a little confidence in such titles. Here is an estate said to be worth thirty thousand dollars sold for five dollars. Under such circumstances, a purchaser is scarcely warranted in claiming a liberal indulgence to the defects of his title paper.

RYLAND, J., concurring, the judgment will be reversed.

GAMBLE, J., did not sit.

Upon retrial of this case, the plaintiff again obtained judgment, and the defendant again appealed. The court decided, upon the grounds submitted for the appeal—1. That it would not reverse a judgment because the lower court had not permitted a party to have the opening and the closing of the case to the jury, unless the refusal had produced a wrong to the party; 2. An agreement to reconvey upon repayment of purchase money with interest is a mortgage. The case is reported in 22 Mo. 77.

THE PRINCIPAL CASE IS CITED in *Shirlin v. Daley*, 37 Mo. 491, to the point that statutes authorizing proceedings which divest the citizen of his title to real estate, though for the good of the public, as well as the powers given by such acts, must be strictly construed and strictly pursued; in *Lackey v. Labke*, 36 Id. 121, to the point that a sheriff's deed must contain recitals which are required by the statute. A sheriff's deed which does not show that the land was sold at any term of court is void: *Martin v. Bonsack*, 61 Id. 557. Though the court in the principal case did not feel called upon to decide whether any of the requirements of the statute were merely directory, yet other cases in this state have decided that certain recitals are unnecessary, while mistakes in others are not fatal, making such decisions, however, without prejudice to the decision in the principal case. Thus *Buchanan v. Tracy*, 45 Id. 440, 441, cited the principal case to the point that "recitals of sheriff's deed are so far essential that they must show authority to sell, and that the sale was made substantially according to law;" but held that a mistake in the return of an execution, or in the sheriff's deed, as to the date of sale, was not essential. So *Strain v. Murphy*, 49 Id. 341, held that a sheriff's deed was not bad because its recitals omitted the day of the month when the sale was made, where they showed that the sale was made during the term of court, and while the court was actually in session. This was maintained, however, without prejudice to the doctrines laid down in the principal case. *Stewart v. Severance*, 43 Id. 322, cites the case to the point that an omission of recitals necessary to show a valid sale is fatal, but holds that a mistake of the clerk in reciting in the execution the day the judgment was rendered would not invalidate the sale. Under a statute not requiring a recital of the time, place, and manner of sale, the decision in the principal case was not in point: *Dann v. Miller*, 8 Mo. App. 478.

RECITALS IN SHERIFF'S DEED, NECESSITY AND EFFECT OF: See *Brooks v. Rooney*, 56 Am. Dec. 430, and note citing prior cases 435; *Caldwell v. Walters*, 55 Id. 592, and note 611.

TITLE ACQUIRED BY PURCHASER AT SHERIFF'S SALE: See *Spindler v. Atkinson*, 56 Am. Dec. 755, and note citing prior cases 761; see *Caldwell v. Walters*, 55 Id. 592; *Byers v. Fowler*, 54 Id. 271.

BIDAULT v. WALES.

[19 MISSOURI, 36.]

ONE PURCHASING GOODS ON CREDIT KNOWING HIS INSOLVENCY AND INABILITY TO PAY is not guilty of such fraud as will avoid the sale if he purchased without the preconceived design of not paying for them.

VENDEE PURCHASING GOODS WITH PRECONCEIVED DESIGN OF NOT PAYING FOR THEM obtains no property in the goods.

QUESTION OF FRAUDULENCY OF SALE OF GOODS IS FOR JURY.

PRECONCEIVED DESIGN OF NOT PAYING FOR GOODS PURCHASED MAY BE EVIDENCED by a resale of them at a sacrifice, an assignment in insolvency or to a favored creditor, or absconding with the goods, or other circumstances.

APPEAL from St. Louis circuit court. The opinion states the case.

Knox and Kellogg, for the appellant.

A. Buckner, for the respondents.

By Court, Scott, J. Bidault & Co. stated in their petition that they sold at New Orleans, to A. W. Whiting, of whom the defendants are consignees, sixteen hogsheads of sugar, to be paid for ten days after the sale; that Whiting failed to pay at the time agreed upon; that when the sale took place Whiting was insolvent and wholly unable to pay for the sugar; that his inability and insolvency were then well known to him, and that he was then unable to comply with his promise; that for the causes and reasons aforesaid, Whiting procured the possession of said sixteen hogsheads of sugar by false pretenses and fraudulent practices and acts. On a trial, there was a judgment for the plaintiffs.

From the face of the petition, it appears that the only fraud and deceit practiced by Whiting was the purchasing of the sugar, knowing his insolvency and inability to pay for it; for the fraud and fraudulent practices charged are only stated as a conclusion from the fact that Whiting knew of his insolvency and inability to pay, at the time of the sale; so the case raises the question whether if one knowing his insolvency and inability to pay purchases merchandise at ten days' credit, for which he afterwards fails to pay, he is guilty of such deceit as will avoid the sale.

This case steers clear of the question as to the vendor's right of stoppage *in transitu* in the event of the insolvency of the vendee, before an actual or constructive possession by him of the merchandise sold. Here the sale was consummated by the delivery of the subject-matter of it. No case has been

found in which it is maintained that the insolvency of the purchaser, though known to himself and unknown to his vendor, would avoid the sale. The law, as stated by William Story in his work on sales, section 146, is not supported by the case to which he refers, and afterwards in the same work, section 446, he says that the mere fact of the insolvency of the vendee, and his liability to immediate attachment, though well known to himself and not disclosed to the vendor, would not ordinarily amount to such a fraud as to avoid a sale and enable the vendor to bring trover. The rule, as deduced from the cases, seems to be, that no property passes to the vendee if he purchased the goods with the preconceived design of not paying for them: *Bristol v. Wilsmore*, 1 Barn. & Cress. 520; *Noble v. Adams*, 7 Taunt. 59; Chit. Con. 405; Addison in Con. 49; *Lupin v. Marie*, 6 Wend. 82 [21 Am. Dec. 256]; *Cross v. Peters*, 1 Greenl. 876. The question in these cases is one for the jury, and is, whether the vendor had made an improvident sale, or the vendee had fraudulently obtained the goods; whether there was a deliberate plan to obtain the goods, knowing they never would be paid for, which may be evidenced by a resale of them at a sacrifice, an assignment in insolvency or to a favored creditor, or absconding with the goods, or other circumstances; or whether he intended to continue his business and to try to pay for the goods at some time or other. There is no cause of action set out in the petition, according to these principles.

The other judges concurring, the judgment will be reversed.

FRAUD IS MIXED QUESTION OF LAW AND FACT, to be determined by the jury: *Dodd v. McCraw*, 46 Am. Dec. 301; *Briscoe v. Bronaugh*, Id. 108. It is a question of law when the facts are ascertained: *Pettibone v. Stevens*, 38 Id. 57, and note.

PURCHASE OF PERSONAL PROPERTY BY MEANS OF FALSE REPRESENTATIONS OF SOLVENCY gives no title to the vendee: *Hodgeden v. Hubbard*, 46 Am. Dec. 167.

KNOWN INSOLVENCY NOT DISCLOSED DOES NOT OF ITSELF MAKE PURCHASE FRAUDULENT: See note to *Thurston v. Blanchard*, 33 Am. Dec. 707. The principal case is affirmed on this point in *Bidault v. Wales*, 20 Mo. 549.

PRECONCEIVED DESIGN NOT TO PAY IS ENOUGH TO MAKE SALE FRAUDULENT See note to *Thurston v. Blanchard*, 33 Am. Dec. 708.

TIBEAU v. TIBEAU.

[19 MISSOURI, 78.]

CANCELLATION OR DESTRUCTION OF DEED CONVEYING LAND WILL NOT RE-VEST TITLE IN ALIENOR, although done by mutual consent and with a view to that object.

EQUITABLE TITLE ARISING OUT OF CONTRACT FOR SALE OF LAND is a defense where law and equity are blended to an action instituted to recover the possession of the land.

CONTRACT FOR SALE OF LAND UNDER WHICH PURCHASE MONEY HAS BEEN PAID and possession delivered is a good defense to an action by the grantor to recover the possession of the land or of the title deeds delivered.

INSTRUCTION IS ERRONEOUS WHEN ITS EFFECT IS TO TAKE CASE FROM JURY, as where the instruction is simply that there is no evidence to a certain point, this point only impliedly affecting the point in controversy, and there being other evidence from which a verdict might have been rendered for the defeated party.

ACTION by Jerome Tibeau against Joseph Tibeau. The plaintiff alleged that soon after the defendant had conveyed to him a certain tract of land, and the deed had been deposited in the recorder's office for record, the defendant and himself agreed that he should mortgage the land to the defendant to secure a certain debt due from the plaintiff to the defendant; that he authorized the defendant to obtain the deed from the recorder's office in order to facilitate the execution of the mortgage; that the defendant afterwards said that the mortgage need not be executed, but that he would retain the deed until the payment of the debt; that he then supposed the deed to be recorded, but about two years prior to this suit he discovered the contrary; that he thereafter tendered to the defendant the amount of the indebtedness and demanded the deed, but the defendant refused his request, declaring that he had destroyed it; that for several years he had lived upon the land; that when he moved off, the defendant unlawfully took possession, and continues to hold possession, claiming the land as his own. The plaintiff prayed that the defendant be ordered to deliver up the deed, or if it had been destroyed that he be decreed to convey the land to the plaintiff, and also for the possession of the land. The defendant admitted the sale and conveyance of the land to the plaintiff, but denied that the subsequent transaction between himself and the plaintiff was a mortgage of the land. He alleged that the plaintiff, being pecuniarily embarrassed, asked him to purchase back the land; that he agreed to do so, and in payment, indorsed plaintiff's notes, and afterwards paid them pur-

suant to the agreement; that the plaintiff had agreed to execute a deed to him of the land, but it being afterwards learned that the deed had not been recorded, the plaintiff and he agreed that it should be destroyed, with the intention of thereby revesting the title in the defendant. Upon the trial, the plaintiff rested upon the admissions made in the answer. Evidence was offered by the defendant tending to show a sale of the land to him by the plaintiff. Declarations by the plaintiff that he had sold the land to the defendant were introduced. It appeared that the plaintiff did not claim the land until it became valuable. The defendant's instructions were refused, and the court instructed the jury: "There is no evidence before the jury that Jerome Tibeau agreed to the cancellation or destruction of the deed by Joseph to him." Verdict was for the plaintiff, and the defendant appealed.

A. P. and P. B. Garesché, for the appellant.

Frémon & Reber, for the respondent.

By Court, SCOTT, J. The law was correctly stated by the plaintiff, that the cancellation or destruction of a deed conveying land will not revest the title of the alienee in the alienor, although it may be done by mutual consent and with a view to that object. But we do not see how this principle affects the defendant. Admitting that the legal title was in the plaintiff, the pleadings and evidence in the cause show that the defendant relied on the defense that there was such a part performance of a parol agreement respecting the sale of the land in controversy as will entitle him to a judgment in this action. Law and equity being now blended, an equitable title arising out of a contract for the sale of land is a defense to an action instituted to recover the possession of the land, the subject of the contract.

The instruction given by the court that there was no evidence before the jury that the plaintiff agreed to the cancellation of the deed by the defendant to him, only impliedly affected the point in controversy, as the destruction of the deed, without the consent of the plaintiff, would only be a circumstance showing that he made no contract respecting the land. But the error of the instruction is, that it took the case from the jury. The jury was sworn to try the issue, and there were facts and circumstances from which they might have found the defense set up by the defendant. The jury should have been directed that if there was a contract for the sale of the land, and the purchase

money was paid, and possession given up or delivered in pursuance to it, they ought to find for the defendant.

The views here presented are equally applicable, whether this be regarded as a suit to recover the possession of the land in dispute or to compel a delivery of the title deed upon the payment of the money to secure which the title paper was left or deposited with the defendant.

The other judges concurring, the judgment will be reversed and the cause remanded.

INSTRUCTION THAT MAY MISLEAD JURY BY STATING ONLY PART OF EVIDENCE SHOULD BE REFUSED: *Stockton v. Frey*, 45 Am. Dec. 138, and note. Instructions should not remove the case from the jury: *Booster v. Rogers*, 52 Id. 680, and note citing prior cases; *Crozier v. Kirker*, 51 Id. 724. Instruction that there is no evidence that will warrant jury in finding for the plaintiff is erroneous when there is any evidence in his favor: *Houghtaling v. Ball*, *infra*.

EQUITABLE TITLE MAY BE SET UP AS DEFENSE TO ACTION OF EJECTMENT IN TEXAS: *Neill v. Keese*, 51 Am. Dec. 746. In *Arguello v. Edinger*, 10 Cal. 160, and *Weber v. Marshall*, 19 Id. 457, the principal case is cited to the point that a verbal contract for sale of land accompanied with acts of part performance, taking the contract out of the statute of frauds, is pleadable in defense to an action of ejectment under a system of practice where equitable and legal jurisdiction are united.

EJECTMENT BY VENDOR AGAINST VENDEE in possession under contract of sale lies when: See *Fears v. Merrill*, 50 Am. Dec. 226, and note citing prior cases 232. See *Mott v. Clark*, 49 Id. 566.

DESTRUCTION OF CONVEYANCE CAN NOT DIVEST TITLE OF GRANTEE, though performed for that purpose with his consent: *Sally v. Sandifer*, 12 Am. Dec. 687, and note; *Gilbert v. Bulkley*, 13 Id. 57; *Farrar v. Farrar*, 17 Id. 410. But the grantee is estopped from claiming title after consenting to the destruction: Id.

HOUGHTALING v. BALL.

[19 MISSOURI, 84.]

INSTRUCTION THAT THERE IS NO EVIDENCE THAT WILL WARRANT JURY IN FINDING FOR PLAINTIFF is erroneous when the plaintiff has introduced any evidence conducing to support his cause of action.

DELIVERY OF ARTICLE SOLD TAKES CONTRACT OUT OF STATUTE OF FRAUDS. WHERE ARTICLE IS SOLD AND DELIVERED IN ONE STATE, to be paid for upon its arrival in another state, the provision respecting payment serves only to designate the time of payment, and does not subject the contract to the operation of the laws of the latter state.

COURTS OF ONE STATE WILL NOT TAKE JUDICIAL COGNIZANCE of any laws of sister state at variance with the common law; but upon common-law questions, the legal presumption is that the common law of a sister state is similar to our own.

BURDEN OF PROVING STATUTE OF FRAUDS OF SISTER STATE is upon party relying thereon.

EXISTENCE OF DELIVERY OF GOODS SUFFICIENT TO TAKE SALE OUT OF STATUTE OF FRAUDS is a question of fact for the jury, under the direction of the court.

ERROR to St. Louis circuit court. There was evidence tending to show a delivery and acceptance of the wheat sold. The counsel for the defendants in error claimed that the contract was void under the Missouri statute of frauds, and that there was no delivery. The case is otherwise sufficiently stated in the opinion.

J. A. Kasson, for the plaintiff in error.

Knox and Kellogg, for the defendants in error.

By Court, SCOTT, J. The plaintiff's petition stated that he sold to the defendants two thousand bushels of wheat, at the price of one dollar and five cents per bushel, to be paid for upon the arrival of the wheat at St. Louis, to the agents of the plaintiff; that the wheat was sold to the defendants, and delivered to their agent at Chicago, in the state of Illinois, who was to ship the same to St. Louis; that the wheat was shipped to St. Louis, and that the defendants refused to receive it and pay for it. The answer of the defendants denied all the material facts set forth in the petition. After the plaintiff had offered some testimony conducing to establish his cause of action, the court instructed the jury that there was no evidence that would warrant the jury in finding a verdict for the plaintiff, upon which the plaintiff submitted to a nonsuit.

As there was evidence in support of the plaintiff's action, the instruction should not have been given. The jurors were the judges of the weight of evidence. If there was a question of law upon the testimony in the cause, the facts should have been hypothetically stated in an instruction, and the law applied to them. It is obvious that, as the case comes from the court below, there is no question of law for this court to decide. None was made, and so far as the record is concerned, we are utterly at a loss to ascertain the point on which the cause was determined in the court below.

It is not perceived how the statute of frauds could affect the contract, as stated in the petition. It is alleged that the wheat was sold and delivered. If so, the statute had nothing to do with the case. There being a delivery of the article sold, the contract was taken out of the operation of the statute. The al-

legation that the payment was to be made upon the arrival of the wheat at St. Louis serves only to designate the time of payment, and by no means subjects the contract to the operation of the laws of Missouri. The laws of Illinois alone operated on the agreement.

The courts of this state will not take judicial cognizance of any of the laws of our sister states at variance with the common law; but upon common-law questions, the legal presumption is that the common law of a sister state is similar to that of our own: *Wilson v. Cockrill*, 8 Mo. 7. This principle would throw the burden of proving the Illinois statute, if it were necessary, on the defendant.

As to the delivery, it may be remarked that it is a question of fact to be found by the jury, under the direction of the court.

The other judges concurring, the judgment will be reversed and the cause remanded.

COMMON LAW IS PRESUMED TO PREVAIL IN SISTER STATES: *Thompson v. Monrow*, 56 Am. Dec. 318; *Dunn v. Adams*, 35 Id. 42. The principal case is cited to this point in *Lucas v. Ladew*, 28 Mo. 342, in which it was held that although days of grace on sight bills were abolished in Missouri, the court would presume them allowable according to the common law in a sister state or territory.

COURT CAN NOT JUDICIALLY KNOW RATE OF INTEREST IN ANOTHER STATE until it has been ascertained as any other fact by the finding of a jury: *Cooke v. Crauford*, 46 Am. Dec. 93; *Harrison v. Harrison*, 56 Id. 227.

DELIVERY AND ACCEPTANCE TO TAKE PAROL CONTRACT OF SALE OF GOODS out of statute of frauds: See *McKnight v. Dunlop*, 55 Am. Dec. 370, and note; *Shindler v. Houston*, 49 Id. 316, and extensive note.

LAW OF PLACE WHERE CONTRACT IS MADE OR IS TO BE PERFORMED governs the contract: See *Speed v. May*, 55 Am. Dec. 540, and note citing prior cases.

PAYNE v. CLARK & BROTHERS.

[19 MISSOURI, 152.]

DISCREPANCY EXISTING BETWEEN AMOUNT STATED IN BODY OF CERTIFICATE OF DEPOSIT and that stated in the margin, or at the bottom, will be controlled by the amount stated in the body of the instrument.

WHERE CERTIFICATE OF DEPOSIT STATES AMOUNT IN BODY OF INSTRUMENT as "one thousand and fourteen dollars (in funds as below)," in the margin as \$1,014, but at the bottom as "currency \$404, cash \$1,010, [total] \$1,414," the amount stated in the body of the certificate controls the specification of funds at the bottom; and if the plaintiff declares upon the instrument as for one thousand four hundred and fourteen dollars, an instruction that he can not recover is correct, though the defendant acknowledges his indebtedness for one thousand and fourteen dollars.

APPEAL from St. Louis circuit court. The opinion states the case.

A. Buckner, for the appellant.

Haight and Shepley, for the respondents.

By Court, RYLAND, J. The plaintiff's petition states that he deposited in the banking-house of Clark & Brothers the sum of one thousand four hundred and fourteen dollars; four hundred and four dollars of this sum being in currency, and the balance, one thousand and ten dollars, in cash; and that at the time of making the deposit the defendants executed and delivered to him a certificate of deposit, as follows:

“ BANKING-HOUSE OF E. W. CLARK & BROS.
St. Louis, Mo., 26th Feb'y, 1851.

“ No. 760.

“ L. P. Payne has deposited in this office one thousand and fourteen dollars (in funds as below), payable to order of himself, on return of this certificate, sixty days after date, with interest at the rate of six per cent per annum.

“ \$1,014.	Currency.....	\$404
	‘ Cash.....	1,010
		“ \$1,414

“ E. W. CLARK & BROS.”

The petition alleges that the defendants by mistake inserted “one thousand and fourteen dollars” where they ought to have inserted “one thousand four hundred and fourteen dollars” in the body of said certificate. He states that after the expiration of two months he presented said certificate of deposit for payment, and it was refused.

The defendants deny in their answer that plaintiff ever deposited one thousand four hundred and fourteen dollars with them, but admit the deposit of one thousand and fourteen dollars. They admit that the certificate of deposit set forth in the petition was executed by them, and allege that the “one thousand and ten dollars” opposite the word “cash” was a mistake, and ought to have been “six hundred and ten dollars,” which was the true and correct sum, and that the sum of one thousand and fourteen dollars was the true and real amount deposited; and that they offered to pay that sum to plaintiff, and were always ready to pay that sum.

On the trial the plaintiff read the certificate of deposit, and then rested his case.

The defendants then asked the following instruction: "The jury are instructed that upon the case as made the plaintiff is not entitled to recover;" which instruction was given. The plaintiff thereupon suffered a nonsuit, which he afterwards moved to set aside, and failing in his motion, he brings the case here by appeal.

The plaintiff complains of the instruction given to the jury. In the opinion of this court, the instruction was proper. The plaintiff declared on a certificate of deposit for one thousand four hundred and fourteen dollars; he alleges that he deposited that amount with the defendants. To support his petition, he presents the certificate above set forth, which can not be said to be a certificate for one thousand four hundred and fourteen dollars, but is a certificate for one thousand and fourteen dollars. He failed entirely to prove the allegation as to the certificate and amount declared on, and it was right for the court to say, from the case made by plaintiff himself, he could not recover.

This view of the case depends upon the certificate of deposit being only for one thousand and fourteen dollars, and not for one thousand four hundred and fourteen dollars. Let us see what the authorities are upon this subject.

The sum of one thousand and fourteen (in funds as below) dollars is written on the face of the certificate in words. On the left hand of the certificate is the mark, \$1,014. Above the name of Clark & Brothers is the memorandum:

" Currency	\$404
" Cash	1,010
	<hr/>
	" \$1,414 "

The defendants contend that this is a certificate calling only for one thousand and fourteen dollars. The plaintiff contends that it calls for one thousand four hundred and fourteen dollars, and that the memorandum "in funds as below," with the currency four hundred and four dollars, and cash one thousand and ten dollars, controls the other words, and makes it for one thousand four hundred and fourteen dollars. Chitty on Bills, 149, says: "There is no absolute necessity for the superscription of the sum for which the bill is payable, provided it be mentioned in the body of the bill; but the superscription will aid an omission in the body, and it is now the usual mode to superscribe the sum payable in figures at the head of the instrument and in words in the body of it. If there be a discrepancy

between the sum in the body of the bill and the superscription, the former will prevail." Again, at page 160 of the same treatise: "If the sum in the superscription of the bill be different from that in the body of it, the sum mentioned in the body will be taken as the sum to be paid *prima facie*."

Story on Bills is to the same point. He says: "The sum is sometimes expressed in figures in the superscription, as well as in the body of the instrument in letters, for greater caution. But if the sum in figures on the superscription differs from the sum in words in the body of the instrument, the latter will be deemed the true sum; and parol evidence is inadmissible to establish that the sum intended was not that stated in words in the body of the instrument, but was that stated in the margin in figures." In the case of the *Norwich Bank v. Hyde*, 13 Conn. 282, Williams, C. J., in delivering the opinion of the court, says: "The aid, then, the margin is to give is to remove an ambiguity in the body of the instrument, or to clear up a doubt, not to supply a blank. The body of the instrument must be our guide." He referred to *Elliot's Case*, in Leach, 185. There the note in the body of it was for fifty —, in the margin £50. The margin helped out the body; it was able to remove the ambiguity. Yet in this case of *Elliot's*, the judges would not decide, even with the aid of the margin, that, as a matter of law, the note was for fifty pounds, but that was properly left to the jury. There is a class of cases where memoranda are made upon notes and bills, and a question has arisen how far these memoranda become part of the instrument, such as the following on a note: "Payable at Messrs. B. & Co., bankers, London." It was held that this did not make part of the contract: *Williams v. Waring*, 10 Barn. & Cress. 2. Where the indorsee declared against the maker of a promissory note, that he made the same payable at the house of Messrs. B. & Co., London, and upon production of the note at the trial it appeared that the address at the house of Messrs. B. & Co. was not a part of the note, but only a memorandum at the foot of the note, it was held that this was a variance: *Exon v. Russell*, 4 Mau. & Sel. 505.

In *Saunderson v. Piper*, 5 Bing., N. C., 425, a bill of exchange was expressed in figures to be drawn for two hundred and forty-five pounds, in words for two hundred pounds, value received, with a stamp applicable to the higher amount, held that the evidence to show that the words "and forty-five" had been omitted by mistake was not admissible. Tindal, C. J., said:

"The evidence in question being inadmissible, we can not shake the rule of commercial writers, that where a difference appears between the figures and the words of the bill it is safer to attend to the words. If we take the authority of these writers, where we have none of our own, this is a good bill for the sum expressed in the body."

Bosanquet, J., said: "The argument that pressed me the most is the rule of *fortius contra proferentem*; that an instrument must be taken most strongly against the party making it. But there is no case in which that principle has been applied to an instrument the body of which expressed a clear amount, and the ambiguity arises from a different amount expressed in the margin. Under such circumstances, the rule of law as to evidence must prevail."

Erskine, J., said: "I am of opinion that the words in the body must be taken as containing the amount of the bill to be paid; for according to the authorities, figures are not of the same authority as words in the body of a bill, except in cases where the margin does not contradict, but is only an index to the body, as in the case of *Rex v. Elliot*, above cited."

Marius lays it down: "If it so fall out that through unadvisedness or error of the pen the figures of the sum and the words at length of the sum that is to be paid upon any bill of exchange do not agree together, either that the figures do mention more and the words less, or that the figures do specify less and the words at length more, in either or in any such like case you ought to observe and follow the order of the words mentioned at length and not in figures, until further order be had concerning the same, because a man is more apt to commit an error with his pen in writing a figure than he is in writing a word; and also because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a *brevial* thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had."

Applying the rules of decisions in cases of bills of exchange to this certificate of deposit, and it is only obligatory for one thousand and fourteen dollars. It promises to pay this sum, and this must control the specification of funds at the bottom. The sum in the margin is for one thousand and fourteen dollars. The sum in words in the body of the certificate is the same, and it will be contrary to the rules and authorities of courts of high character in England and in the United States

to let the memorandum specifying the funds in which the deposit was made, and the amount thereof in figures, control the body of the instrument and the margin of the instrument too.

The judgment of the court below is affirmed, with the concurrence of the other judges.

The plaintiffs again brought suit to recover the one thousand and fourteen dollars mentioned in the body of the certificate. The case came before this court, and is reported in 23 Mo. 259. The decision upon the question then presented was, that the certificate of deposit would bear interest after maturity as well as before.

WORDS WRITTEN IN BODY OF CERTIFICATE, BILL, OR NOTE, when plain and definite, must control without regard to the superscription in figures. The principal case is cited to this point in *Poorman v. Mills & Co.*, 39 Cal. 350.

PAROL EVIDENCE THAT BILL WAS DRAWN FOR SUM EXPRESSED IN MARGINAL FIGURES, and not for sum expressed in body of it, where they differ, is inadmissible: *Smith v. Smith*, 53 Am. Dec. 652, and note; see *Nugent v. Roland*, 13 Id. 381, and note.

THORNTON v. RANKIN.

[19 MISSOURI, 193.]

LEGAL TITLE TO NOTE PAYABLE TO ORDER OF "C., GUARDIAN," ETC., is in C., and passes by his indorsement to a *bona fide* assignee for value without notice, the words "guardian," etc., being mere *descriptio personæ*.

ACTION commenced by petition in the nature of a bill of interpleader by George Engelmann. Engelmann had purchased real estate, the property of Priscilla and Jacob Cooper, minors, at a sale under order of the probate court, by Isaac J. Cooper, their guardian. In part payment of the purchase price, he made negotiable notes payable to the order of "Isaac J. Cooper, guardian," etc. Before their maturity, these notes were indorsed by Isaac J. Cooper and delivered for a valuable consideration to Thornton, who was not aware of the facts connected with the execution of the note, and had no notice of the trust resting upon Isaac J. Cooper, except from what appeared upon the face of the notes. Isaac J. Cooper was afterwards removed from the guardianship, and Rankin, the appellant, appointed in his stead. Rankin forbade Engelmann to pay the notes to Thornton, which was the occasion of the filing of this petition. These facts being found, the court below ordered Engelmann to pay the money to Thornton, whereupon Rankin appealed.

T. T. Gantt, for the appellant.

T. Polk, for the respondent.

By Court, RYLAND, J. The main question in this case involves the power of the payee, Isaac J. Cooper, to whom the notes were executed, to assign the same.

The appellant, Rankin, contends that the notes given to Isaac J. Cooper, guardian of Jacob Cooper and Priscilla Cooper, were not the property of said Isaac J. Cooper, in such manner as to authorize him to assign or transfer them.

In the opinion of this court, the notes were the property of said Isaac J. Cooper. He had the legal right to them, and therefore he could sell or assign or transfer them, and his assignee for value, without notice, would hold them, and have a right to the money arising thereon. The assignee Thornton, then, in this case has the legal right to the notes in question and to the money arising thereon.

There is no question as to the manner in which Thornton obtained the notes; he paid value for them. The payee, Isaac J. Cooper, transfers to him notes before they become due, and the only way in which Rankin wishes to implicate Thornton and to affect him with notice arises from the words "guardian," etc., which follow Cooper's name on the face of the notes. We do not consider that these words import any impediment to the right which the payee in them had to sell or transfer them; but that, notwithstanding these words, the full title to the notes and the money they call for was vested in said Isaac J. Cooper.

In the case of *Turnbull v. Freret*, 5 Mart., N. S., 703, a note was given thus: "Good for one thousand six hundred and forty-three Spanish milled dollars, payable on the first day of January next, to the order of Mr. Charles Norwood, executor of Messrs. Trumbull & Joyce, for balance due to the estate. New Orleans, 1st January, 1802. (Signed) Jas. Freret." The supreme court of Louisiana held that the words "as executor," in this note, can be considered in no other light than as words of description; that the legal title to receive the money vested in Norwood, and the heirs can not pass it by and commence an action in their own name.

This court has held the same doctrine as to words of description. These notes, then, on their face, were the property legally of the said Isaac J. Cooper, and he was entitled to receive the money they called for, and being the owner and payee, he had the right and authority to assign the same, and his assignee to have and receive the money due thereon.

In the case of *Jeffries v. McLean*, 12 Mo. 538, the bond sued upon was as follows:

“For value received, we, or either of us, promise to pay A. Ransom, guardian of J. G. Roberts, the just sum of three hundred and forty-nine dollars and fifty cents, without defalcation or discount, together with ten per cent interest per annum thereon, from this date until paid. Given under our hands and seals, at Union, this twenty-ninth day of March, 1839.

“(Signed)

JOHN L. HAMILTON. [Seal.]

“THOMAS BUCKNER. [Seal.]

“C. S. JEFFRIES.” [Seal.]

This court held that this bond is evidence of a debt due by the obligors, Hamilton, Buckner, and Jeffries, to A. Ransom, and his executor can maintain the action thereon. The words “A. Ransom, guardian of J. G. Roberts,” are but *descriptio personæ*.

There is no charge here that Thornton and Cooper fraudulently, and with design to cheat the wards, Priscilla and Jacob, traded concerning these notes; no knowledge on the part of Thornton of any interest in these notes in any third person, other than what the face of the notes expresses.

In view of all the facts, then, contained in the record, this court is of the opinion that the judgment below should be affirmed; and with the concurrence of the other judges, it is affirmed.

ADMINISTRATOR IS PERSONALLY LIABLE ON NOTE which he signs as administrator of deceased: *Davis v. French*, 37 Am. Dec. 36.

WORD “GUARDIAN” IN NOTE IS MERE DESCRIPTIO PERSONÆ. To this point the principal case is cited in *Nickerson v. Gilliam*, 29 Mo. 457.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

BEEBE v. DUDLEY.

[26 NEW HAMPSHIRE, 249.]

NOTICE TO GUARANTOR IS UNNECESSARY where his undertaking is absolute, but where his undertaking is collateral, notice must be given within a reasonable time, or it must appear that the situation and circumstances of the parties are such that no injury has resulted to the guarantor from the want of notice.

OBJECT OF NOTICE TO GUARANTOR is to let him know that he is relied upon for payment; and it should be given to him whenever it would be of any advantage to him to have it, that he may, if possible, secure himself against liability.

NOTICE TO GUARANTOR IS UNNECESSARY UPON INSOLVENCY of the person for whom the undertaking was made.

NEGLECT TO GIVE NOTICE TO GUARANTOR MUST PRODUCE SOME LOSS or prejudice, otherwise notice and demand before the action is brought is sufficient.

UNDERTAKING OF GUARANTOR IS COLLATERAL AND NOT ABSOLUTE when, for value received, he guarantees to pay the plaintiff for two thousand dollars' worth of goods, delivered to one Dudley when he may call for them; especially when the facts show that the plaintiffs regarded Dudley as the principal in the transaction, and the credit was given to him.

ASSUMPSIT on a guaranty. The case was referred to an auditor, who found substantially the following facts: On the fourteenth of October, 1847, the defendant entered into a contract of guaranty as follows: "For value received, I, Moses Dudley, of Chesterfield, New Hampshire, guarantee to pay James M. Beebe & Co., of Boston, for two thousand dollars' worth of goods, delivered to Charles P. Dudley, of Lowell, when he may call for them. Moses Dudley. Chesterfield, October 14, 1847."

At that time Charles P. Dudley was a merchant in Lowell, and before the guaranty was executed had purchased two bills of goods of plaintiffs, for which he was indebted to them. Subsequently to its execution he purchased several bills of goods of them. The charges were all made to Charles P. Dudley. The evidence tended to show that the plaintiffs would not sell to Dudley on his sole responsibility. Charles P. Dudley did not pay for any of the goods sold him, and failed in 1848. There was no evidence that notice had been given the defendant until the commencement of the suit. The auditor refused to allow the claim for goods delivered before the guaranty, but found for the plaintiff for the value of goods delivered after the guaranty, with interest. The questions arising on the report were transferred to this court for determination.

Wheeler and Faulkner, for the plaintiffs.

Carlton and Cushing, contra.

By Court, EASTMAN, J. There is some confusion in the books as to the precise nature and extent of a contract entered into by a guarantor. The same undertaking, embraced in almost the same terms, has by some jurisdictions been declared to be absolute, while in others it is held to be collateral merely. And this by tribunals of high standing: *Butler v. Wright*, 20 Johns. 367; *Oxford Bank v. Haynes*, 8 Pick. 423 [19 Am. Dec. 834]; *Sage v. Wilcox*, 6 Conn. 81; *Curtis v. Brown*, 2 Barb. 51.

The difficulty seems to be not so much in deciding what the law is, when once the extent of the contract entered into is defined, as in settling what the contract is, whether collateral or absolute.

In the case of promissory notes, the liability of a guarantor is ordinarily greater than that of an indorser and less than that of a surety. His position is between that of an indorser and surety, and his liabilities vary from both. And in a suit against a guarantor, his contract must be specially set forth in the declaration.

A guarantor warrants the solvency of his principal and the payment of the debt in case of his default; while an indorser is answerable only upon a strict compliance with the law by the holder, whether the principal is solvent or not.

A surety is liable without notice, while a guarantor in many cases is discharged unless notice be given him.

Where the undertaking to pay is absolute, notice to the guarantor is unnecessary. His liability is fixed without demand or

notice: *Breed v. Hillhouse*, 7 Conn. 523; *Union Bank of Louisiana v. Coster*, 1 Sandf. 563; *Matthews v. Chrisman*, 12 Smed. & M. 595 [51 Am. Dec. 124]; *Butler v. Wright*, 20 Johns. 367; 3 Kent's Com. 124; *Cooper v. Page*, 24 Me. 73 [41 Am. Dec. 371]; *Carson v. Hill*, 1 McMull. 76.

Where the undertaking is collateral and not absolute, notice must be given within a reasonable time, or it must appear that the situation and circumstances of the parties are such that no injury has resulted to the guarantor for the want of notice. The object of notice is to let the guarantor know that he is relied upon for payment; and it should be given to him whenever it would be of any advantage to him to have it, that he may, if possible, secure himself against liability: *Oxford Bank v. Haynes*, 8 Pick. 423 [19 Am. Dec. 334]; *Gibbs v. Cannon*, 9 Serg. & R. 202; *Norton v. Eastman*, 4 Greenl. 521; *Babcock v. Bryant*, 12 Pick. 133; *Follmer v. Dale*, 9 Pa. St. 83; *Cremer v. Higginson*, 1 Mason, 323; *Howe v. Nickels*, 22 Me. 175; *Mussey v. Rayner*, 22 Pick. 223.

Where the party for whom the undertaking is made becomes insolvent, so that no advantage can arise to the guarantor by notice being given, notice is unnecessary. It must appear that the neglect to give notice has produced some loss or prejudice to the guarantor, otherwise notice and demand before the action is brought is sufficient. Lord Ellenborough, in *Warrington v. Furber*, 8 East, 242, says that guarantors insure the solvency of the principals, and therefore, if the latter become bankrupt and notoriously insolvent, it is the same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them: *Salisbury v. Hale*, 12 Pick. 416; *Warrington Furber*, *supra*; *Oxford Bank v. Haynes*, *supra*; *Philips v. Astling*, 2 Taunt. 206; 3 Kent's Com. 123; *Skofield v. Haley*, 22 Me. 164 [38 Am. Dec. 307]; *Rhett v. Poe*, 2 How. 457; *Peck v. Barney*, 13 Vt. 93.

Was the undertaking of this defendant absolute, or collateral? It would seem to be plain by the latter clause of the contract, "when he may call for them," that the engagement related to goods that should be thereafter delivered; that the undertaking was to pay for future sales, and not for the past; and that therefore, at the time the contract was made, nothing had been done upon which an absolute promise could operate—nothing upon which an action could then be supported. Again, no time is fixed in which goods are to be delivered, which is usually an essential element to an absolute contract, and the designation of

Charles B. Dudley as of Lowell would at least indicate that he was not the mere agent of the defendant. These matters, coupled with the use of the term "guarantee," would seem to show that, judging from the instrument alone, the undertaking was only collateral. But when the facts disclosed by the auditor are also considered—that the goods were procured in different parcels, that the bills were made out to Charles P. Dudley, and that the charges upon the plaintiffs' books were also made to him—it would seem clear that the parties, or at least the plaintiffs, understood Charles P. Dudley to be the principal in the transaction, that the original credit was given to him, and that the agreement of the defendant was only collateral.

In *Babcock v. Bryant*, 12 Pick. 133, the undertaking was "to be responsible and pay to the plaintiff for whatever goods have been or may be delivered to C. within one year." The plaintiff delivered goods to C. within the year, and took his negotiable note for the price. It was held that the undertaking of the defendant was collateral only, and that his liability as guarantor was not discharged by the plaintiff's taking C.'s note.

We think the undertaking in this case was collateral, and consequently, reasonable notice of the amount furnished and of claim upon Moses Dudley therefor should, under ordinary circumstances, have been given to him, in order to perfect his liability.

But notwithstanding the undertaking was collateral, and notwithstanding notice was not given, at least till the day on which the suit was commenced, yet inasmuch as Charles P. Dudley failed in January, 1848, less than three months after the date of the guaranty, and before one half of the amount for which the guaranty was given was obtained, the plaintiffs are relieved from showing any special notice or any particular and special demand. Before the failure, notice was unnecessary, and after it had taken place, it could be of no service to the defendant. He has not, therefore, been prejudiced by want of notice; and notice and request, at any time before the commencement of the suit, would be sufficient.

Whether any notice of the plaintiffs' claim was given to the defendant before the commencement of the suit does not distinctly appear. The auditor finds that no notice was given "until the commencement of the suit," and counsel differ as to the construction that shall be put upon this finding. The plaintiffs state that notice was given and demand made, and a refusal by the defendant on the day of the commencement of

the suit, before the writ was served. But this is not acceded to by the defendant, and the report must, therefore, be recommitted to ascertain this fact.

Report recommitted.

NOTICE TO GUARANTOR OF NON-PAYMENT, NECESSITY OF.—In case of an absolute guaranty, the guarantor is not entitled to demand or notice of non-payment: See the cases cited in the note to *Menard v. Scudder*, 58 Am. Dec. 619; *Matthews v. Chrisman*, 51 Id. 124; *Batchelder v. Wendell*, 36 N. H. 216, citing the principal case. But where the guaranty is conditional, notice must be given: *Lane v. Levillian*, 37 Am. Dec. 769; *McDougal v. Calef*, 34 N. H. 534, citing the principal case. This distinction was recognized in *Powers v. Bumeratz*, 12 Ohio St. 273, and *Milroy v. Quinn*, 69 Ind. 406, both citing the principal case. Where an absolute guarantor is not injured by the want of notice, he is liable just the same as if duly notified; and the absence or want of notice does not imply such an injury to the guarantor as will discharge him from his liability. To have that effect, it must be shown affirmatively that he has been injured by the omission. It is a matter of defense: *Simons v. Steele*, 36 N. H. 81. Demand or notice is unnecessary if the debtor is insolvent: *Skofield v. Haley*, 38 Am. Dec. 307; but to excuse notice on this ground, it must be shown not only that the debtor was insolvent at the time the debt accrued, and unable to pay his debts, but also that he had no attachable property: *Whiton v. Mears*, 45 Id. 233. Necessity of notice to guarantor of promissory note: See *Marberger v. Pott*, 55 Id. 479; *Riggs v. Waldo*, 56 Id. 356.

UNDERTAKING OF GUARANTOR, WHEN PRIMARY AND WHEN COLLATERAL: See *Lane v. Levillian*, 37 Am. Dec. 769; *Rapelye v. Bailey*, 8 Id. 129. Where the defendants gave the plaintiff a guaranty, stating, in substance, that they were acquainted with principal, and reposing confidence in his honesty, would hold themselves bound for such goods as the plaintiff should intrust him with, provided he should sell them and abscond with the money or squander them, the guaranty is conditional: *McDougal v. Calef*, 34 N. H. 534; and the following guaranty, omitting date and signature, is conditional: "Gents: Allow me to say to you that any cigars that C. Conover, of Logansport, Ind., may order from you for the next six months, if he fails to pay you for them, I will stand responsible to you for them:" *Milroy v. Quinn*, 69 Ind. 406, both citing the principal case.

CARR v. CLOUGH.

[26 NEW HAMPSHIRE, 280.]

MINOR BEFORE ARRIVING AT FULL AGE MAY RESCIND SALE of personal property, made on a valuable consideration but without fraud on his part. INFANT RESCINDING CONTRACT MUST RESTORE PROPERTY OR CONSIDERATION received before he can maintain his action for the property sold.

IF INFANT DISAFFIRMS CONTRACT AND REFUSES PAYMENT on the demand of the adult for payment, or if suit be brought against him and he pleads infancy and avoids the debt, the adult may thereafter, in case the property be in the infant's possession, maintain replevin therefor, or demand the property, and upon refusal, bring trover and recover its value, *semble*.

UPON RESCISSION OF CONTRACT BY INFANT AND RESTORATION of the property or consideration received by him, or an offer to restore the same, the infant may maintain a special action on the case for the damages sustained, or may bring trover upon showing a conversion of the property. INFANT RESCINDING CONTRACT OF SALE CAN NOT MAINTAIN TROVER against the purchaser, where, before the rescission, he made a *bona fide* sale of the property to a third person; but if the sale was invalid, the action would lie.

DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION; they do not constitute a conversion if the party has not the power of compliance.

COURT WILL ALWAYS PREVENT CIRCUITY OF ACTIONS whenever it can be done and the rights of the parties be substantially preserved.

PLAINTIFF, a minor, exchanged a horse with the defendant for a mare, and the defendant agreed to pay the plaintiff ten dollars additional. The following Monday the plaintiff told defendant he wanted to exchange back, and the defendant said he would not do so unless the plaintiff paid him fifteen dollars. The mare was not present at the time, and the plaintiff then made no offer to return her. The defendant promised to come up and pay plaintiff the extra ten dollars, but failed to do so. These transactions took place in October, 1850. In December following, the plaintiff took the mare with him to the defendant's house, said he would not abide by the contract, offered to return the mare, and demanded the return of the horse. The defendant would not return the horse, and assigned no reason for not doing so. Before this rescission by the plaintiff, the defendant had sold the mare. Verdict for plaintiff by consent, to be set aside or judgment to be rendered thereon, according to the opinion of the court.

Edes, and Freeman and McClure, for the defendant.

Burke, contra.

By Court, EASTMAN, J. There is no suggestion in this case of any misrepresentation or fraud on the part of the minor, in entering into the contract between him and the defendant, and nothing tending to show that the defendant was not perfectly aware of the minority of the plaintiff when the exchange of horses took place between them. And the defendant must be presumed to have entered into the contract with a full knowledge of the legal privileges that are extended to infants.

A question is made at the outset, whether the contract between the parties was fully executed or not. In many cases this would be an important inquiry, but in the present case we do not view it as such, and we shall, therefore, treat the contract as an exe-

cuted one, since we do not regard it as material to the decision of the cause to consider the contract to be of a lower degree, or other than that contended for by the defendant.

There is some conflict in the books as to the question whether an infant can rescind an executed contract before coming of age. Some authorities hold that it can not be done in any class of contracts; that the infant lacks the legal discretion to do the act of avoidance; while others maintain that it may be done in all; that the privilege would be ineffectual and the infant unprotected without it. Other authorities make a distinction between contracts relating to real estate and those which pertain to personal property, holding that the deed of an infant can not be avoided by him till after arriving at full age, while a sale of personal property may be at any time, either before or after.

The precise question presented here, and that which in fact lies at the foundation of this action, is this: Can an infant during his minority rescind a sale of personal property made by him, without fraud, after he has delivered the property to the purchaser, for a good consideration paid by the latter?

In *Roof v. Stafford*, 7 Cow. 179, it was expressly held that a sale and delivery of goods by an infant, with his own hand, is not voidable till he comes of age, and so also in regard to his conveyances of real estate. The decision of this case was chiefly founded upon the authority of *Zouch v. Parsons*, 3 Burr. 1794, which was an action of ejectment, the precise question being whether an infant's conveyance by lease and release was absolutely void or only voidable. Lord Mansfield examined and reviewed the authorities upon the question, and laid down this rule among others, that an infant can not avoid his conveyance of lands till the age of twenty-one years. His reasoning was taken as the foundation of the decision of *Roof v. Stafford*, *supra*, and his rule has been adopted in many other cases. But it should be borne in mind that he was discussing the question as applicable to conveyances of real estate, and that the question of sales of personal property was not before him; and hence, although the case may be high authority in contracts affecting real estate, it can have no direct bearing upon those affecting personal property. In many of the decisions, too, which have been made upon the authority of *Zouch v. Parsons*, *supra*, the attention of the court does not appear to have been called to any distinction that may be taken between contracts touching real estate and those pertaining to personal property.

The decision made in *Roof v. Stafford*, *supra*, was reversed by the

court of errors, in *Stafford v. Roof*, 9 Cow. 626. The action was trover, originally brought by Stafford, a minor, in the mayor's court of the city of Albany, for a horse sold by Stafford to Roof. The mayor's court held that Stafford, although a minor, could rescind his contract and maintain the action. Roof brought a writ of error, and the action was carried to the supreme court, where the decision was made as reported in 7 Cow. 179, and where it was held that Stafford could not avoid the contract till arriving at full age. From the supreme court the case was carried to the court of errors by Stafford, and that court held that the action would lie before Stafford arrived at the age of twenty-one, and affirmed the judgment of the mayor's court. Jones, chancellor, said: "The general rule is, that an infant can not avoid his contract, executed by himself, and which is, therefore, voidable only while he is within age. He lacks legal discretion to do the act of avoidance. But this rule must be taken with the distinction that the delay shall not work unavoidable prejudice to the infant, or the object of his privilege, which is intended for his protection, would not be answered. When applied to a sale of his property, it must be his land; a case in which he may enter and receive the profits until the power of finally avoiding shall arrive; and such was the doctrine of *Zouch v. Parsons*, 3 Burr. 1794. Should the law extend the same doctrine to sales of personal estate, it would evidently expose him to great loss in many cases; and we shall act up to the principle of protection much more effectually by allowing him to rescind while under age, though he may sometimes misjudge and avoid a contract which is for his own benefit. The true rule, then, appears to me to be this: that where the infant can enter and hold the subject of the sale till his legal age, he shall be incapable of avoiding until that time; but where the possession is changed, and there is no legal means to require and hold it in the mean time, the infant, or his guardian for him, has the right to exercise the power of rescission immediately." The learned chancellor proceeded also to say that the common law gives no action or other means by which the mere possession of personal property can be reclaimed and held, subject to the right of avoidance; and the decision that the contract could be avoided during minority was accordingly made.

There is no fact before us involving the question whether a conveyance of real estate may be avoided within age or not, and we need express no opinion in regard to it. But it appears to us that the reasoning in *Stafford v. Roof*, *supra*, so far as the

same is applicable to this case, is founded upon correct principles. If the subject of the sale be personal property, and a delivery to and possession by the vendee follows, and there are no legal means to regain the property till the minor arrives at full age, so as to decide whether he will ratify the contract or not, the property may all be wasted and gone, beyond recovery, and in many cases for a very inadequate consideration. In such cases, the principle of protection would be of little use could it not be exercised before maturity. We lay down the rule, then, that a sale and delivery of personal property by a minor, for a good consideration, but made without fraud by him, may be rescinded by the minor before arriving at full age: *Stafford v. Roof*, 9 Cow. 626; *Shipman v. Horton*, 17 Conn. 481; *Willis v. Twambly*, 13 Mass. 204; Bing. on Infancy, 64, note 5.

But if the infant rescinds the contract, and seeks to recover the article sold by him, he must restore the property or consideration received before he can maintain his action for the property sold. This is but even-handed justice, and a contrary doctrine would oftentimes enable the infant to use his minority for the perpetration of gross fraud. Thus in *Badger v. Phinney*, 15 Mass. 363 [8 Am. Dec. 105], Putnam, J., says: "As to the sale of the goods to the plaintiff, it is sufficient to say that the contract was executed by Rand, the infant. He delivered the goods and received the money for them, and we should have required him to restore the money before recovering the goods. We must remember that the privilege of infancy is a shield, not a sword." The principle is this: that upon the rescinding of the contract by the infant, the parties shall be restored to their original rights.

Many cases are to be found where this principle has been acted upon, so far as the circumstances would permit, and among them we cite the following: *Ketchen v. Lee*, 11 Paige, 107; *Hubbard v. Cummings*, 1 Greenl. 13; *Taft v. Pike*, 14 Vt. 409 [39 Am. Dec. 228]; *Badger v. Phinney*, 15 Mass. 362 [8 Am. Dec. 105]; *Buffington v. Gerrish*, Id. 156 [8 Am. Dec. 97]; *Smith v. Evans*, 5 Humph. 70; *Holmes v. Blogg*, 8 Taunt. 508; *Roberts v. Wiggin*, 1 N. H. 73 [8 Am. Dec. 38]; *Roof v. Stafford*, 7 Cow. 182; *Homer v. Thwing*, 3 Pick. 492; *Vasse v. Smith*, 6 Cranch, 231; *Fitts v. Hall*, 9 N. H. 441.

Badger v. Phinney, *supra*, was replevin, and the precise point decided was this: that where goods are sold to an infant on a credit, and he avails himself of his infancy to avoid payment, the vendor may reclaim the goods as having never parted with his property

in them. And in *Fills v. Hall, supra*, it was held that if an infant disaffirms a contract by which goods have been sold to him, if he has the goods in his possession, and refuses to deliver them to the vendor upon a demand for that purpose, trover may be maintained against him for the conversion. The same case also lays down the principle, that where the property has passed from the hands of the infant, trover will not lie, although if there has been fraud practiced by the infant, a special action on the case may be sustained.

The doctrine upon this point, as gathered from the weight of authority, and which seems to be founded in good reason, appears to be this: 1. That the infant shall not be permitted to rescind his contract, and recover the articles parted with by him, without first restoring the property or consideration received therefor. 2. That in case of sale by an adult to an infant, if the adult demands the payment or consideration promised by the infant, and he disaffirms the contract and refuses payment, or, if suit be brought against him, pleads infancy and avoids the debt, the adult may thereafter, in case the property be in the infant's possession, maintain replevin therefor, or demand the property, and upon refusal, bring trover and recover its value. If, however, the infant has parted with the possession of the property sold him, the adult is remediless, provided there has been no fraud practiced. If there has been, a special action on the case may be sustained.

From the principles which we have endeavored to lay down, it follows that upon the rescission of a contract by an infant, and the restoration of the property or consideration received by him, or the offer to restore the same, the infant may maintain a special action on the case for the damages sustained, or may maintain trover upon showing a conversion of the property. By the rescission each party is entitled to his respective property, so far as they themselves are concerned.

It follows, also, in the absence of fraud, where the contract is fully executed, that until the same is rescinded, the adult has the right to the property which he has received, and has the right to make a *bona fide* sale of the same before the rescission.

Assuming, then, that the horse, for the value of which this action was brought, was sold in good faith by the defendant and its possession parted with before the formal rescission of the contract by the plaintiff, on the second of December, and assuming, also, that nothing had taken place that would amount to or be evidence of a rescission until that day, this action can not be

sustained; for the contract being executed, and the animal delivered to the defendant by the plaintiff himself, the sale of the horse by the defendant before the rescission could not amount to a conversion, since the possession of the defendant was at that time rightful and his control over the property complete. Nor would the plaintiff be aided by the demand and refusal, for it was made after the defendant, upon the assumption of a *bona fide* sale, had legally parted with the property, and when he had no power to comply with the demand. A demand and refusal merely are only evidence of a conversion. They do not constitute a conversion, if the party has not the power of compliance: *White v. Phelps*, 12 N. H. 385; *Knapp v. Winchester*, 11 Vt. 351. The demand here, in order to be effectual, would necessarily have to be made before the sale and after the rescission.

The case finds that the horse was sold by the defendant before the second of December, and that there was no formal rescission of the contract until that day, and no demand and refusal till then. Unless, therefore, the evidence was competent to show that the contract was rescinded before the sale, or that the sale was made in bad faith by the defendant, or was fictitious, so that the rescission on the second of December, and the demand and refusal on that day, would be effectual, the action of trover can not lie, and the plaintiff would necessarily be put to his special action on the case.

A court will always prevent a circuitry of actions whenever it can be done and the rights of the parties be substantially preserved. And we think it may be prevented in this case. Here was evidence from which the jury might well find that the sale by the defendant was not made in good faith. In the first place, the defendant did not pay or offer to pay the ten dollars, the difference in the exchange, as he agreed to do, either on the day after the sale or on the day next succeeding the first interview after the exchange. It would appear as though he retained the money, under the apprehension that the plaintiff would not abide by his bargain. In the next place, he was told by the plaintiff, soon after the exchange, that he wished to trade back. This was sufficient to put him on his guard not to part with the horse, while at the same time it might induce him to sell the animal at once. Again, when the plaintiff went to the house of the defendant, on the second of December, and taking the mare with him, offered to return her, and informed the defendant that he would not abide by the trade, and requested the defendant to deliver him the horse, the defendant refused to do it, saying

that he would not let him have the horse, and would not receive back the mare; and he assigned no particular reason for this refusal; he gave no intimation that he had sold the horse. Now, if the sale which he had made was free from fraud and valid, if there was nothing dishonest or fictitious about it, he would scarcely have failed to have stated at once that he had sold the animal, and he would most naturally have given that as one reason at least why he could not exchange back. But he makes no mention whatever of the sale. And if, as was said in argument and not denied, the sale was made to the father-in-law of the defendant, it would give a coloring to the transaction which the jury would be very likely to notice. Taking all the evidence together, we think it entirely competent to show an invalid sale by the defendant, and of course the rescission, and the demand and refusal on the second of December, were good.

We might suggest the inquiry whether, after the defendant had refused to trade back, as was done on the Monday succeeding the exchange, it was necessary for the plaintiff to take the mare to the defendant and offer to restore her, in order to complete the rescission of the contract; and whether a sale of the horse, even if made in good faith, would not, after the plaintiff had requested the defendant to trade back, amount to a conversion. But the views which we have expressed render it unnecessary to examine these inquiries. The result to which we have arrived does justice between the parties. It protects the infant and gives to him the value of his horse, while at the same time it, in effect, restores to the defendant the animal which he himself had parted with.

Judgment on the verdict.

POWER OF INFANT TO RESCIND CONTRACT BEFORE ARRIVING AT FULL AGE: See *Farr v. Sumner*, 36 Am. Dec. 327; *Grace v. Hale*, Id. 296.

DUTY OF INFANT RESCINDING CONTRACT DURING MINORITY TO RETURN CONSIDERATION: See *Taft v. Pike*, 39 Am. Dec. 228; *Kitchen v. Lee*, 42 Id. 101. The executor of an infant can disaffirm her executed contract for the sale of trees and recover the value of them only on the same terms that she could do it, that is, by restoring the money she received on them: *Bartlett v. Cowles*, 15 Gray, 446, citing the principal case.

DEMAND AND REFUSAL AS EVIDENCE OF CONVERSION: See *Magee v. Scott*, 55 Am. Dec. 49.

FROST v. MARTIN.

[26 NEW HAMPSHIRE, 421.]

MONEY PAID ON JOINT PROMISSORY NOTE BY ONE MAKER CAN NOT BE DIFFERENTLY APPLIED by an arrangement between the persons paying and the payee; the other promisors are discharged to the extent of such payment, and the one making the payment can not restore their liability by any arrangement with the payee.

ASSUMPSIT. Plaintiff purchased of defendant a note drawn by Staples, Pray, and Morse (the last two as sureties), in favor of Shapleigh and others. The defendant represented the note as wholly due and unpaid. Prior to the sale Staples had paid to Shapleigh two hundred dollars on the note and received a receipt for the same, and agreed to indorse the sum on the note. The note had been in the possession of one Locke, another payee, and shortly after receiving the money Shapleigh learned that Locke had transferred the note for a full consideration to the defendant. He then offered the two hundred dollars back to Staples, but the latter told him to apply it on other debts. The plaintiff contended that Staples could not by any arrangement with Shapleigh divert the money to any other purpose than payment on the note without the consent of the other makers. The court ruled otherwise, and instructed the jury that if the money was obtained without the aid of either of the sureties, and without an understanding between him and either of the sureties that it was to be applied on the note, Staples might by arrangement with Shapleigh apply the money to other demands without the consent of the other signers of the note. Verdict for defendant. Plaintiff moved for a new trial.

R. Eastman, and Christie and Kingman, for the plaintiff.

Jordan and McCrillis, contra.

By Court, Woods, J. The plaintiff, in this case, seeks to recover back a part of the price which he paid the defendant for the note of Staples and others, upon the ground that when he bought the note two hundred dollars had in fact been paid towards it by Staples, of which the plaintiff was at the time of the purchase ignorant. The case distinctly finds that such a payment had been made by Staples to Shapleigh, one of the payees entitled at the time to demand and receive such payment. But it is said that soon after this payment had been made and acknowledged by a written paper from Shapleigh to Staples, these two, for reasons which appear in the case, agreed

that that application of the two hundred dollars should be annulled, and the sum appropriated to different objects.

Before this payment was made, the note stood good for its entire face against Shapleigh, Pray, and Morse, either of whom had a right at this time to pay it, and so to discharge the others. The liability of each to pay the note would have been at an end the moment that either of them should pay it; and this liability to pay any part of it was of course dissolved *pro tanto* the moment such part should be paid by either. But there is nothing in the relation of joint promisors upon a note that enables one of them who has, by having paid the note, discharged the liability of the others to make an arrangement with the payee to restore it again.

There seems to be no difficulty in applying these clear principles to the present case. Staples, who was the principal, made a payment upon the note to Shapleigh, a payee, having undoubted authority to receive the payment. The act was consummated; nothing could have been added to make it more perfect. Pray and Morse, of course, ceased to be longer liable to the extent of that payment.

Whether Staples and Shapleigh at any time, whether a long or a short time after the payment, might have altered their arrangements so as to revive the debt against Staples, is not material as regards the rights of this plaintiff. He bought and paid for a note of four hundred and fifty-five dollars against Staples, Morse, and Pray. But as to two hundred dollars, it turns out that the two last-named parties were not liable at the time of the purchase.

Whether the money belonged to Staples, or in part to the other signers, is not material. Supposing it to have been his, he paid it in discharge of a duty towards his sureties, and could not without their consent reclaim it.

As to the first point, therefore, we hold the ruling of the court below to have been erroneous. No opinion is necessary to be given as to the other questions arising on the case. The verdict should, therefore, be set aside and a new trial granted.

STATE v. MOORE.

[26 NEW HAMPSHIRE, 448.]

VENUE WAS ALWAYS REGARDED AS MATTER OF SUBSTANCE IN CRIMINAL TRIALS; and at common law, an offense commenced in one county and consummated in another could be tried in neither.

TRIAL OF ACCESSARY BEFORE FACT IN FELONY COMMITTED IN ANOTHER STATE can not be had in the county where the offense was consummated, but only in the state and county in which he committed the offense of procuring and advising the commission of the principal offense.

LAW OF ENGLAND, BOTH COMMON AND STATUTE, as it was at the organization of the provincial government, so far as the same is consistent with our institutions, is the law of New Hampshire, unless it be repugnant to the constitution, or altered or repealed by some statutory or legislative enactment.

INDICTMENT. The opinion states the case.

Wells, Bell, and Christie and Kingman, for Moore.

Sullivan, attorney general, contra.

By Court, Woods, J. The present case is an indictment, found in the county of Strafford, in this state, against Moore, for the alleged offense of procuring Curtis and Pray to burn the building in Somersworth, for the burning of which they are charged in this indictment. Curtis and Pray are, for the purposes of this decision, to be regarded as the guilty agents of Moore in the felony. Moore was only an accessory before the fact, and whatsoever acts were committed by him were committed in the county of York, in the state of Maine.

The question, then, is, whether by reason of the procurement of the commission of the felony, through the agency of persons guilty of the principal offense, Moore, the accessory, is to be regarded in law as guilty of an offense in the county in which the principal offense was committed, and answerable for it therein. The venue was always regarded as matter of substance in criminal trials; and at common law, therefore, an offense commenced in one county and consummated in another could be tried in neither: 1 Ch. Crim. L. 177. So if a mortal blow was given in one county and the party died of it in another, it was doubted whether he could be punished in either: Id. 178; 2 Hawk. P. C., c. 25, sec. 36, referring to and citing the Year-Books, 6 Hen. VII. 10, and 10 Hen. VII. 28; Bac. Abr., Indictment, F; Preamble of 2 & 3 Edw. VI., c. 24. See also 1 Hawk. P. C., c. 31, sec. 13, and authorities there cited.

At common law, an accessory to a crime committed in another county, it is said, could be indicted in neither county: 1 Ch. Crim. L. 178; 1 Hale P. C. 62, 63.

But by the statute of 2 & 3 Edw. VI., c. 24, sec. 4, it was enacted "that when any murder or felony shall be hereafter committed and done in one county, and another person or more shall be accessory or accessaries in any manner or wise to any

such murder or felony in any other county, that an indictment found or taken against such accessory or accessaries upon the circumstances of such matter, before the justices of peace, or other justices or commissioners to inquire of felonies, in the county where such offenses of accessory or accessaries in any manner or wise shall be committed or done, shall be as good and effectual in the law as if the said principal offense had been committed or done in the same county where the same indictment against such accessory shall be found."

Upon the question before us, in connection with the provisions of this statute, we have looked into the authorities, and will now refer to them briefly and state the result.

The law upon this subject, we think, is quite clear and well established, unless our statutes may be found to have altered it.

In 1 Ch. Crim. L. 191, the doctrine is laid down thus: "If a shot be fired in one county, or poison be administered, which becomes fatal in another, the venue must be laid in the latter; but it would be otherwise if A. in one county should procure B., a guilty agent, to commit a murder in the second, because, in that case, A. would be an accessory before the fact, and triable as such in the county where he was guilty of the murderous contrivance. On the other hand, if a person unconscious of the guilty design, as a child without discretion, be employed in the commission of murder, the venue must be laid in the county where the death happened, for they are merely the instruments, and the contriver is the principal." In *Rex v. Girdwood*, 1 Leach, 142, the prisoner was indicted in the county of Middlesex, for feloniously sending a threatening letter. Upon the proof, it turned out that the letter, which was directed to the prosecutor, had been delivered by the prisoner in London to a person who put it into the post-office at London, from which place it was conveyed in due course of mail to the prosecutor in Middlesex. He was tried for the offense in Middlesex, and the twelve judges of England were unanimously of opinion that the prisoner had been properly tried in Middlesex. In the case of *Rex v. Coombes*, Id. 388, it was decided that a person who, standing upon the shore, shot a man on the high seas, was guilty on the high seas, inasmuch as the crime is committed where the death happens, and not at the place whence the cause of the death proceeds.

So in 1 Hale P. C. 616, and in Fost. C. L. 349, the doctrine is laid down, that if A. in one county deliver poison to D., to be administered to B. as a medicine in another county, and D., not

knowing that it is poison, administers it to B. in the second county, and B. die of it; or if a person in one county procure a child without discretion to burn a house in a second, the procurers, in such cases, would be principals in the felonies, though not present, and therefore ought to be indicted where the poisoning or burning is effected, although it would be otherwise if their agents were guilty as principals, because in the latter case the procurers would be accessaries before the fact: 1 Hale P. C. 514; Fost. C. L. 349.

It appears, also, that the agency of the defendant in a foreign county may be inquired of in the county where the principal act is done, and that the poisoning or burning, or other felony, may be alleged to have been committed by the principal in the county where the act was done by the innocent agent: Starkie on Crim. Pl. 24.

Rex v. Brisac, 4 East 164, was an information at common law, for a conspiracy between the captain and purser of a man-of-war for planning and fabricating false vouchers to cheat the crown, which planning and fabrication were done upon the high seas. It was held by the court of king's bench that the offense was well triable in the county of Middlesex, upon proof of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post and the application there by an innocent third person, a holder of one of the vouchers, a bill of exchange, for payment, which he there received. Grose, J., in delivering the judgment of the court, remarked thus: "That the delivery of such false vouchers, with such fraudulent intent, in pursuance of a conspiracy for that purpose, is an offense in the place where the vouchers were delivered, is a matter which can not be doubted; though the conspiracy may have been in another place. And in the present case, the delivering the vouchers, and the presenting the bill of exchange to the commissioners of the victualing office in Middlesex, were the acts of both the defendants, done in the county of Middlesex. I say it was their acts, done by them both; for the persons who innocently delivered the vouchers were mere instruments in their hands for that purpose." A similar rule of law was laid down in the case of *Commonwealth v. Harvey*, in the Boston municipal court, in October, 1828, by Judge Thatcher, in which several authorities are referred to: 8 Am. Jur. 69. The same principle was recognized by the supreme court of Massachusetts in the case of *Commonwealth v. Hill*, 11 Mass. 136. It was there held that the procuring a

counterfeit bank note to be passed by an ignorant boy, as a true one, was sufficient evidence of the passing by the defendant, who employed the boy to pass it.

According to the authorities cited, which are believed to contain and to show what was the law of England upon the subject under consideration, after the passage of the act of 2 & 3 Edw. VI., c. 24 (A. D. 1549), we think there can be no doubt that in England an accessory in a felony before the fact could, in virtue of that act, be tried for the offense only in the county in which he committed the offense of procuring or advising the commission of the principal offense, which was committed in another county. And it seems to us that this view is in accordance with the general principle of the common law that crimes are local, and can only be tried in the county where they are committed. The crime of the accessory, if it can be regarded as committed anywhere, is committed at the place where the intelligent agent is procured to commit the principal act. And so far as we are advised, the law of England remained the same from the passage of the act aforesaid to the time of the American revolution.

And it is well settled that the law of England, both common and statute, as it was at the organization of the provincial government, so far as the same consists with our institutions, is the law of New Hampshire, unless it be repugnant to the constitution, or altered or repealed by some statutory or legislative enactment: *State v. Rollins*, 8 N. H. 550.

And we are not aware that the law of England, adopted and in force in this state, has been so altered as to reach the case under consideration. There is no doubt that by the provisions of the revised statutes, chapter 225, section 2, the English law is so far altered, that if the commission of a crime be procured in one county in this state, to be committed in another, and the same be actually committed in the other by the principal offender, the accessory may be tried in either county. The provisions are that "if any person shall aid in the commission of any offense, or be accessory thereto before the fact in one county, which offense may be committed by the principal offender in another county; or if parts of any offense may be committed in more than one county, in either of said cases the offense shall be deemed to have been committed, and the indictment may be found and the trial had, in either county.

But we do not regard those provisions as embracing the case under consideration. Here Moore was not accessory to the

felony in any county in this state, but in the county of York in the state of Maine. The provision is not that in such a case the offense shall be deemed to have been committed and that the trial of the accessory may be had in a county in this state. The provision is, that in the cases provided for the trial shall be had in either of the two counties mentioned, viz., the county in which the commission of the principal offense was planned or procured by the accessory, or that in which the principal offense was actually committed. A construction that would give a right of trial in either county, in a case like the present, would involve the absurdity of a provision for the trial of the offense in another state in which the aid was given or the commission of the offense was procured.

On the whole, we are of the opinion that the indictment can not be maintained against Moore in the county of Strafford upon the facts stated for the consideration of this court.

Motion granted.

VENUE IN CRIMINAL CASES: See *State v. McCoy*, 41 Am. Dec. 301.

AIDERS AND ABETTERS.—This subject is discussed in the note to *State v. Hildreth*, 51 Am. Dec. 369.

ENGLISH COMMON AND STATUTE LAW, HOW FAR PART OF LAW OF UNITED STATES: See *State v. McCoy*, 41 Am. Dec. 301; *Lathrop v. Commercial Bank*, 33 Id. 482; *Commonwealth v. York*, 43 Id. 373; *Stout v. Keyes*, Id. 465; *Commonwealth v. Webster*, 52 Id. 711; *Union Bank v. Powell's Heirs*, Id. 367; *Sutcliffe v. State*, 51 Id. 459; *McGinnis v. State*, 49 Id. 697; *State v. Smith*, 54 Id. 578; *Smith v. State*, Id. 607; *Wright v. Hicks*, 56 Id. 451; and cases cited in the note to *City Council v. Benjamin*, 49 Id. 618. *Commonwealth v. Macloon*, 101 Mass. 10, citing with approval the principal case, regarded the statute of 2 & 3 Edw. VI., c. 24, as a part of their common law.

JARVIS, ADM'R, v. BROOKS, ADM'R.

[27 NEW HAMPSHIRE, 87.]

WHERE REAL ESTATE IS USED FOR PARTNERSHIP PURPOSES, and paid for with partnership funds, it is unnecessary that there should be an agreement among the partners that the land should be partnership property. SUBSEQUENT ATTACHMENT BY CREDITORS OF PARTNERSHIP WHO HAVE ATTACHED PROPERTY OF FIRM takes precedence of a prior attachment by creditors of the individual members of the firm who have attached the same property.

PARTNERSHIP CREDITORS, IN ORDER TO AVAIL THEMSELVES OF THEIR RIGHTS OF PRIORITY, in case of conflicting attachments with individual creditors, require nothing more than a valid execution properly levied.

VERDICT was rendered in the lower court for plaintiffs, by consent, for part of the demanded premises, subject to the opinion of this court. The opinion states the remaining facts.

Parker, for the plaintiffs.

Cushing, for the defendants.

By Court, GILCHRIST, C. J. This is a writ of entry to recover possession of the "blacksmith-shop lot," west of the road, and "the grist-mill lot," east of the road. The title of the plaintiffs is by a levy on the land, as the property of Leonard and Hiram Gilmore, as tenants in common. The title of the defendants is by a levy on the land, alleging it to be partnership property, the defendants' intestate having been a creditor of the firm of L. & H. Gilmore.

The first question is whether the land was or was not partnership property. There have been four firms of which Leonard and Hiram Gilmore were members: 1. In the month of December, 1826, the firm of L. & H. Gilmore was established, composed of Leonard and Hiram Gilmore; 2. On the twenty-sixth of September, 1827, there was made the firm of Gilmore, Hills & Co., consisting of Leonard Gilmore, Ilock Hills, and Morris Clark; 3. In the month of February, 1828, there was made another firm of Gilmore, Hills & Co., consisting of Leonard Gilmore, Hiram Gilmore, and Ilock Hills; 4. On the first of October, 1829, there was made another firm of L. & H. Gilmore consisting of Leonard Gilmore and Hiram Gilmore.

The condition of the property, so far as it regards partnership interest, is as follows:

1. The "blacksmith-shop lot." On the twenty-seventh of December, 1826, John Tyler and James B. Andrews conveyed to Leonard and Hiram Gilmore five eighths of this lot in consideration of the sum of one thousand dollars. Of this sum six hundred dollars were paid from the partnership funds, and the remainder was secured by notes which were afterwards paid by Gilmore, Hills & Co. (No. 2, as above). On the twenty-sixth of September, 1827, Austin Tyler, administrator of Benjamin Tyler, conveyed to Leonard and Hiram Gilmore three eighths of the "blacksmith-shop lot," in consideration of the sum of five hundred and eighty-one dollars and twenty-five cents. This sum was paid from the funds of Gilmore, Hills & Co. (No. 2, as above).

2. The "grist-mill lot." On the twenty-sixth of September, 1827, Austin Tyler, as administrator, conveyed to Leonard Gil-

more, Hiram Gilmore, Hock Hills, and Morris Clark one half of the "grist-mill lot," in consideration of the sum of one thousand four hundred and fifty-five dollars; and on the same day John Tyler conveyed to the same persons the other half of the "grist-mill lot," in consideration of the sum of one thousand five hundred dollars. Of this sum of one thousand five hundred dollars, the consideration of John Tyler's deed, the sum of nine hundred and twenty-five dollars was paid from the funds of L. & H. Gilmore, and a part was paid in cash, but how much does not appear. The rest is unpaid.

The "clover-mill" spoken of in the case constitutes a part of the "grist-mill lot." On the fifth of May, 1829, Gawin Gilmore conveyed it to Leonard Gilmore, Hiram Gilmore, and Hock Hills, in consideration of the sum of three hundred and fifty dollars. For this sum Gawin Gilmore had given his note, payable to Tyler & Andrews, and indorsed by Gilmore, Hills & Co., and it was paid by this firm (No. 3, as above).

The aggregate considerations for these deeds appear from the case to amount to the sum of four thousand eight hundred and eighty-six dollars and twenty-five cents; of which there has been paid from the partnership funds the sum of two thousand eight hundred and fifty-six dollars and twenty-five cents—balance, two thousand and thirty dollars.

The only interest of Gawin Gilmore in the land was by reason of his having become a surety. In consideration of his liability, on the twenty-ninth of July, 1829, L. & H. Gilmore and Hills conveyed to him one fourth of both lots, and he was to reconvey the lands when the notes on which he was surety should be paid. Whatever title he had then was merely in trust.

The substance of what is said in the case about the "store lot" seems to be this: On the twenty-ninth of July, 1829, the title to this lot was in the Gilmores and Hills, and on that day they conveyed to Gawin Gilmore one fourth of it. On the ninth of October, Hills conveyed to the three Gilmores all his interest in the demanded premises, they having conveyed to him, on the first of October, the interest in the store. One deed was in consideration of the other.

It is not expressly stated in the case, but it is to be inferred from the circumstances, that the premises were used for partnership purposes.

It is the opinion of Kent, 3 Com. 39, note, that where such facts exist it is unnecessary that there should be an agreement

among the partners that the land should be considered as personal property; denying the position in *Smith v. Jackson*, 2 Edw. Ch. 28, which holds an agreement to be necessary. Kent says: "The decisions on this side of the question appear to me to be a sacrifice of a principle of policy, and, above all, a principle of justice, to a technical rule of doubtful authority. There is no need of any other agreement than what the law will necessarily imply from the fact of an investment of partnership funds, by the firm, in real estate for partnership purposes. If the partners mean to deal honestly, they can not have any other intention than the appropriation of the investment, if wanted, to pay the partnership debts.

"The circumstance that the payment has been made out of the partnership funds, especially if the property purchased be necessary for the ordinary operations of the partnership business, and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property, and in the absence of all countervailing circumstances, it will be absolutely decisive."

In cases where the real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial, in the view of a court of equity, in whose name or names the purchase is made, whether of one partner or all, whether in the name of a stranger or of one of the firm. In either case, let the legal title be vested in whom it may, it is in equity deemed partnership property, and the partners are the *cestuis que trust*: Story, J., in *Hoxie v. Carr*, 1 Sumn. 173, 182, 183. The same doctrine, going equally far, is contained in *Dyer v. Clark*, 5 Met. 562, and *Howard v. Priest*, Id. 582. We have held in the case of *Jarvis v. Brooks*, 23 N. H. 136, and in numerous other cases referred to by the court, that the creditors of a partnership who have attached the property of a firm take precedence of creditors of the individual members of the firm who have attached the same property.

The land, then, being partnership property, and the partners holding it for the benefit of the partnership creditors, the equitable interest is attachable. The interest of a *cestui que trust* in land will pass by the extent of an execution upon the land as his estate: *Pritchard v. Brown*, 4 N. H. 397 [17 Am. Dec. 431]. And a subsequent attachment of the partnership property by a creditor of the firm will take precedence of a prior attachment of the property by a creditor of an individual partner: *Tappan v. Blaisdell*, 5 Id. 190.

The declaration by Leonard and Hiram Gilmore, in bankruptcy, that the land was private property, can not affect the nature of it.

As to the levies: It is said that the defendants' attachment is dissolved, for certain reasons. But it is not seen how any question arises about the dissolution of the attachment. The defendants' execution, being against the partners, takes precedence of the attachment and levy of the plaintiffs. It is, then, immaterial which party had the prior attachment. It would seem that the levy of an execution is good for the amount of the execution and costs: *French v. Eaton*, 15 N. H. 337.

If the execution takes precedence of the plaintiffs' attachment, because it is against the partnership property, it disposes of all the questions relating to the dissolution of the attachment.

It appears from the case that Upham's attachment, on which the plaintiffs rely, was made on the seventh of September, 1841, and his execution was levied on the thirtieth of August, 1849. The attachment on the writ in favor of Grout, the defendants' intestate, was also made on the seventh of September, but before Upham's attachment, and the execution was levied on the fifteenth of March, 1849. Objections are made because the *ad damnum*, in the defendant's writ of attachment, was two thousand one hundred dollars, and the amount of property directed to be attached was two thousand dollars, and the sum levied was two thousand one hundred and fifty-six dollars and twenty-two cents, being a greater sum than the officer was directed to attach for, and because judgment was taken for more than the *ad damnum* in the writ.

Whatever validity there might be in the objections, if the original parties on both sides had been creditors of the firm, no questions concerning them arise at present. The partnership creditors having precedence, nothing more is requisite than that they should have a valid execution, properly levied, in order to avail themselves of their right of priority, and this follows as a necessary result of the principle that their claim is superior to that of the creditors of the individual members of the firm.

The opinion of the court is, therefore, that the plaintiffs are not entitled to judgment.

Verdict set aside.

PARTNERSHIP INTEREST IN REAL ESTATE: See *Baker v. Wheeler*, 24 Am. Dec. 66; *Hale v. Henrie*, 27 Id. 289; *Donaldson v. Bank*, 18 Id. 577; *Baca v. Ramos*, 29 Id. 463; *Brooks v. Hamilton*, 13 Id. 328; *Farmer v. Samuel*, 14 Id. 106; *McDermott v. Lawrence*, 10 Id. 468; *Coies v. Coles*, 8 Id. 231; *Hart*

v. *Hawkins*, 6 Id. 666; *Yeatman v. Woods*, 27 Id. 452, and note; *Greene v. Greene*, 13 Id. 643, and note; *Baird v. Baird*, 31 Id. 399, note; *Sumner v. Hampson*, 32 Id. 722; *Wheatley v. Calhoun*, 37 Id. 654; *Dixer v. Clark*, 39 Id. 697; *Divine v. Mitchum*, 41 Id. 241; 1 Wash. Real. Prop., 4th ed., 166 et seq.; *Buchan v. Sumner*, 47 Am. Dec. 305, and note; *Ridgway's Appeal*, 53 Id. 586, and note.

RESPECTIVE RIGHTS OF PARTNERSHIP CREDITORS AND CREDITORS OF ITS INDIVIDUAL MEMBERS: See *Allen v. Wells*, 33 Am. Dec. 757; *Morrison v. Blodgett*, 29 Id. 653; *Ketchum v. Durkee*, 45 Id. 412; *Winston v. Ewing*, 34 Id. 768; *Pearson v. Keedy*, 43 Id. 160; *Dyer v. Clark*, 39 Id. 697; *Sutcliffe v. Dohrman*, 51 Id. 450; *Buchan v. Sumner*, 47 Id. 305; *Kirby v. Schoonmaker*, 49 Id. 160, and the notes to above cases.

SMITH v. NASHUA AND LOWELL RAILROAD

[27 NEW HAMPSHIRE, 86.]

CASES ENUMERATED WHERE PERSON MAY BECOME LIABLE AS DEPOSITARY. WHERE PROPERTY OF ONE PERSON IS VOLUNTARILY RECEIVED BY ANOTHER, by delivery of the owner, for some different purpose from that of keeping it, and upon an express or implied agreement of a different kind which has been answered or performed, and the property remains in the hands of such party without further agreement, the law imposes the duty of a depositary without any actual contract for that purpose.

WHERE RIGHT TO RECEIVE COMPENSATION FOR HIS SERVICES may be inferred from the circumstances of a deposit, the duty of the bailee becomes that of a depositary for hire, and he is bound to exercise ordinary care. A gratuitous depositary is bound to only slight care.

COMMON CARRIER, WHOSE DUTY AS SUCH HAS TERMINATED, can not lay aside the goods which he has carried and neglect them, but he still remains liable for the care and custody of the property until he has delivered it to the owner or his agent, or has placed it in such a situation as may fairly be regarded as equivalent to a delivery.

IT IS NOT NECESSARY THAT EXPRESS POWER SHOULD BE GIVEN TO COMMON CARRIER OF GOODS in its charter to assume the liabilities of a depositary. This is one of the ordinary incidents of such corporations, unless specially restricted.

COMMON CARRIER, WHO HAS PERFORMED HIS CONTRACT AS SUCH, and delivered or offered to deliver, or done something equivalent to a delivery of the goods intrusted to him, may refuse to enter into a new contract for keeping or storing said goods as a bailee for hire or a depositary. If he persists in his refusal to receive them as such, and does not interfere with them in any manner, he is not liable as a depositary for any damage which may happen to such goods.

COMMON CARRIER MAY BECOME LIABLE AS DEPOSITARY where the owner of goods was present at the time they were landed, and was notified by the agent of such carrier that they had no room in which to store them, if such agent afterwards places the goods in a storehouse used by such carrier for storage purposes. In such a case the jury may infer that the agent has waived his refusal to take charge of them.

OWNER OF GOODS DOES NOT MAKE COMMON CARRIER'S AGENT HIS OWN, after being notified to remove his goods, by leaving them in the care of such agent, even though such agent has instructions from his principal not to care for goods so situated.

THE jury returned a verdict for plaintiff. The opinion states the necessary facts.

Metcalf and Cushing, for the plaintiff.

Wheeler, for the defendants.

By Court, BELL, J. The declaration in this case claims to charge the defendants as depositaries only. And the first question which presents itself is whether they are such.

The ordinary case of a deposit is where the owner of goods delivers them to another, to be kept for him, without any agreement expressed or reasonably to be implied that the person to whom they are delivered shall receive any compensation for his services or care. But there is a large class of deposits where there is no actual delivery to keep, and no actual agreement to accept the goods, or to keep or take care of them, and where the contract of a depositary is implied from the nature of the transaction or occurrence by which the property comes into the hands of one not the owner, and from the principles of equity and justice which ought to govern the conduct of men towards each other.

Generally no person can be compelled to become a depositary without his own consent; but there are cases where a person may be subjected to the duties and liabilities of a depositary simply, or of a depositary for hire, without an intention on his part to enter into any contract, or to assume any liability in regard to the property in question.

The finder of the property of a person unknown is not bound to interfere with it. He may pass by it, if he pleases, and has then no responsibility in relation to it. But if he takes it into his possession, he becomes at once bound, without any actual contract, and perhaps without any actual intention to bind himself to the owner of the property, for its safe keeping and return. And by the better opinion, we think the duties of a finder of property are, in law, precisely the same, except so far as they may be varied by the provisions of our statutes, as those of a person who has voluntarily received a deposit of goods to be kept for the owner without charge: 1 Bouv. Inst. 428; Story on Bailments, 61; *Isaack v. Clark*, 2 Bulst. 306; 1 Parsons on Contracts, 579; Story on Contracts, 257; 6 Bac. Abr. 681.

If, however, it is provided by statute that the finder shall be entitled to a compensation for the keeping, or if an agreement to that effect may under the circumstances be reasonably inferred, the presumed contract of the finder and his liabilities will be those of a depositary for hire, which differ essentially from those of a simple, that is gratuitous, depositary: Story on Bailments, 289; Jones on Bailments, 97; 1 Bouv. Inst. 406.

A much more numerous and frequent class of cases, where the law imposes the duty of a depositary without any actual contract for that purpose, is where the property of one person is voluntarily received by another by delivery of the owner for some different purpose from that of keeping it, and upon an express or implied agreement of a different kind, which has been answered or performed, and the property remains in the hands of such party without further agreement. In such cases, the law, having regard to the requirements of justice between men, implies a contract for the keeping of the property until it shall be restored to the proprietor or his agent; and the contract thus implied is ordinarily that of a depositary. The holder is bound to take care of, keep, and preserve the property, not for the sake of any benefit to himself, nor upon any expectation of compensation for his services, but solely for the convenience and accommodation of the owner: Story on Bailments, 292, 347; *Ostrander v. Brown*, 15 Johns. 35 [8 Am. Dec. 211]; *In re Webb*, 8 Taunt. 443; *Hyde v. Trent and Mersey Nav. Co.*, 5 T. R. 389; *Garside v. Trent and Mersey Nav. Co.*, 4 Id. 581; *Fisk v. Newton*, 1 Denio, 45 [43 Am. Dec. 649]; 1 Parsons on Contracts, 459; *Thomas v. B. & P. R. R.*, 10 Met. 472 [43 Am. Dec. 444].

The slightest degree of care known to the law is that of a depositary, such slight care as is taken by every man of common sense of his own property under like circumstances, as it was well laid down by the court below. This, presumptively, is the extent of the responsibility of one upon whom is thrown the care and custody of property where he has not voluntarily assumed any liability directly for these purposes: 1 Bouv. Inst. 431; Story on Bailments, 41; 2 Kent's Com. 560; Angell on Carriers, 293.

Where a right to receive a compensation for his services may be reasonably inferred from the circumstances of the case, the duty of the bailee becomes that of a depositary for hire, and his liability is increased to a responsibility for ordinary neglect, which is the want of such reasonable care as men in general take of their own property under similar circumstances: 1 Bouv. Inst.

406; Jones on Bailments, 49, 96, 97; Story on Bailments, 289; *Cailiff v. Danvers*, Peake, 114; *Finucane v. Small*, 1 Esp. 315; 2 Kent's Com. 586.

There is this distinction between the case of the finder of goods and that of the person in whose possession such property has remained at the close of a previous bailment: The person who finds an article may leave it untouched. He in whose house or premises the property of another is casually left may treat it as damage-feasant. He may suffer it to remain undisturbed, or he may take it and remove it to a near and convenient distance, and there leave it in a suitable place for the use of the owner, doing it no unnecessary damage while he is removing it, and he will thereby incur no responsibility, speaking without reference to the statute provisions: 2 Saund. Pl. & Ev. 388; 2 Ch. Pl. 548; *Peaslee v. Wadleigh*, 5 N. H. 317.

But the party into whose hands the property of another has come by virtue of a contract for some other purpose can not, when that purpose is accomplished, either leave it where it happens to be or lay it by and neglect it, unless that may be fairly inferred from the nature of the contract to be the intention and understanding of the parties; but he still continues to owe a duty to the owner, still remains liable for the care and custody of the property until he has delivered it to the owner or his agent, or has placed it in such a situation as may be fairly regarded as equivalent to a delivery to him: *Ostrander v. Brown*, 15 Johns. [8 Am. Dec. 211]; *Fisk v. Newton*, 1 Denio, 45 [43 Am. Dec. 649]; 1 Parsons on Contracts, 659; Story on Bailments, 347; Angell on Carriers, 289.

The present is a case of this kind. The goods, the loss of which is now in controversy, were delivered by the owner or his agent to the defendants to be transported by them, in the regular and ordinary course of their business as common carriers, from Boston to Nashua. They were accepted by the agents of the corporation for that purpose, and the corporation then became bound to transport the goods, and the plaintiff became bound to pay them a reasonable compensation for their services. The goods were safely transported to Nashua, and after their arrival the plaintiff had notice of it and opportunity to take them away, but did not remove them. It is clear that the plaintiff being present at the depot, and having reasonable opportunity to take them away, the duty of the defendants as common carriers was fully discharged, and their responsibility as such terminated: *Thomas v. B. & P. R. R.*, 10 Met. 477

In the present case, if it had been made a question, it would have been for the jury to decide whether there was such a delivery of the goods to the plaintiff as would discharge the company of any liability for the goods, or if there was such a tender as would be equivalent to a delivery. But no question of this sort was made at the trial, or here, upon the argument. The transaction was apparently not so understood by either party; and there seems no ground to insist that the defendants had discharged themselves of the custody of these goods. The position taken by them was, that by the neglect of the plaintiff to remove the goods when he was requested to do so by the freight agent, and by leaving them on the company's premises, he had constituted the servants of the company, who were prohibited to receive goods at the risk of the company, his own agents, and therefore any neglect and consequent loss was his own, and the company was not responsible. This was merely a question of fact, upon which the jury might have passed if the question had been raised for their consideration; but it was urged as a matter of law, and the court requested to charge upon it as such. Neither of these matters of fact being insisted upon, we must take it upon the case that the goods remained in the possession of the company, subject to such responsibility on their part as the law imposes in such case, which is that of a gratuitous depository.

But if the fact in this particular should be taken to be that the defendants had discharged themselves of all duty or liability to the plaintiff, by what passed between him and their agent, still it might well be a question, as it was made in this case, whether, notwithstanding the refusal of the agent to keep or store these hides, the corporation, by their subsequent acts, had not waived that refusal and assumed the keeping of them.

As an individual may at first refuse to engage in a business proposed, and yet may afterwards, on further consideration, change his opinion and accept the offer, there can be, we think, no doubt of the powers of such corporations or their agents to do the same. No party is estopped or concluded by such a refusal. And the same kind of evidence will be admissible to prove the waiver of such refusal and the making of such contract, as if no such refusal had occurred. It may be direct proof of a bargain closed in express terms, or evidence of such acts from which a bargain may be reasonably inferred or implied. Many and perhaps most contracts not required to be in writing may be proved by evidence of the conduct and actions of the

parties. This may be done on two grounds: 1. Because it may be a fair inference from such conduct that the parties actually meant so to contract, so understood and intended at the time; and 2. Not because the parties in fact contemplated or understood or intended any contract or agreement of that description, or of any kind, but because justice and equity prescribe such a rule of duty between the parties in the relative situations in which they have placed themselves. The law always implies an agreement to do what a man's legal duty requires him to do. A party may therefore decline to enter into any particular contract, he may refuse in the strongest terms to contract, and the parties may separate without coming to an agreement, and yet the party in whose possession property has been rightfully placed may owe a duty to the owner which may bind him by an implied contract, or he may, by contemporaneous or consequent conduct, furnish evidence by which he may be bound, perhaps by the same contract into which he had in express terms refused to enter.

There is no difference in these respects between the case of an individual and that of a corporation, except that which results from the necessity of proving the authority of the agents, by whom alone the corporation usually act. Their powers may be express and to be proved by the corporate records, or they may be implied, resulting from the official position of the agent and from the usual course of the operations and business of the corporation. Juries are to judge by the words and the actions of men. These may be, and usually are, consistent with each other; but where there is a purpose to be answered or a responsibility to be evaded by false professions, they may be entirely irreconcilable, and credit is to be given to the one or to the other as they seem to the jury to be best entitled to it. It is not in the power of a principal, either individual or corporation, to limit his liability by restrictions upon the powers of his agents while he adopts or allows a course of business inconsistent with those restrictions, and indicating more extensive authority.

In the present case, if we were to understand that the agent of the railroad did in fact utterly decline to store the hides in question, to take any care or responsibility as to them, and the parties separated without an agreement, yet it was competent for the jury, regarding the facts that the hides came rightfully into the possession of the defendants, that they did not insist on their right to leave them as they were or to throw them off

their premises, if they had such right, and that the agents of the corporation removed them from the cars and placed them in their building usually occupied for storing hides, to infer that those agents had changed their minds and concluded to take care of them. In that event there could be but one legal conclusion: that having undertaken to keep them and take some care of them, they were bound to take such care as the law requires in such cases. The instruction of the court as to the degree of care and the measure of their liability was correct. They were bound to use slight diligence. They were answerable only for gross neglect.

The ruling requested by the defendants, that if the agent of the defendants declined to keep or store the hides, and so informed the plaintiff and requested him to take them away, and he nevertheless went off and left them there, it must be presumed that he made the agents of the defendants his own, and must suffer the loss, and that being so left there, the stowing them away by the agents was no more than the defendants' duty, and the corporation by that act were not made liable in this action, was entirely improper.

It can not be overlooked that this proposed ruling is inconsistent with itself. The first position is, that under the circumstances stated, it must be presumed that the plaintiff made the defendants' agents his own. If that were so, those acts of those agents were the acts of the plaintiff, and done at his risk. The defendants were in no way responsible for them. The second position is, that the stowing away of the hides was no more than the duty of the defendants, and the corporation by that act were not made responsible. If it was the mere duty of the defendants, when done by their agents, it would naturally be presumed to be done by the agents as the duty of the defendants, and not by them as the agents of the plaintiff.

If these inconsistent propositions were regarded as designed to be in the alternative and unconnected, both are unsound. We see no ground, in fact, for inferring any employment of the railroad agents by the plaintiff. No evidence tends to show any employment of them at that time to do this service, nor any previous engagement of them, nor any subsequent ratification or approval of them, as acts done on his account. If the defendants had supposed there was ground for such a presumption, it was a mere question of fact, upon which the jury might have been asked to pass their judgment; but there does not seem to us a shadow of ground for saying that there was any pre-

sumption of law either the one way or the other. If the fact of the agency of these persons was to be proved like other facts, by the party who asserted it, and the jury were to weigh the evidence, the court could with no propriety have given the charge requested by the defendants.

If the court were properly requested to instruct the jury that the stowing away of the hides was no more than the defendants' duty, we are entirely unable to concur in the conclusion that the defendants' were not, in point of law, responsible. If it was the duty of the defendants to store these hides, and no more, then the question arises, What was the measure of that duty? and then, Have they performed that duty? The liability of the defendants must, then, depend upon the decision of these matters of fact, which were precisely those submitted to the jury and determined by them.

The deposition was properly detained from the jury. The common rule is, that if a deposition contains matter objected to and not put in evidence, it can not go to the jury.

Judgment on the verdict.

See 1 Parsons on Contracts, 665, 674, where the author cites the principal case. See *Cox v. O'Riley*, 58 Am. Dec. 633, and note.

BEACH v. HANCOCK.

[27 NEW HAMPSHIRE, 223.]

ASSAULT IS COMMITTED BY PERSON WHO AIMS GUN in an excited and threatening manner at plaintiff, standing three or four rods off, and snaps it two or three times, even though such gun was unloaded, if such fact was unknown to plaintiff.

IT IS RIGHT AND DUTY OF JURY, IN ASSESSING DAMAGES in an action of trespass for an assault, to consider what effect the finding of trivial damages would have to encourage a disregard of the laws and disturbances of the public peace, and it is not error for the court to so instruct them.

TRESPASS for an assault. At the trial it appeared that plaintiff and defendant were engaged in an angry altercation, when defendant stepped into his office and brought forth a gun, which he pointed in an excited and threatening manner at plaintiff, who was standing three or four rods distant. The gun was not loaded, but this fact was not known to plaintiff. The evidence tended to show that defendant snapped the gun two or three times. The court instructed the jury that facts similar to the above would constitute an assault. The court

further instructed the jury that, in assessing the damages, it was their right and duty to consider the effect which the finding of light or trivial damages would have to encourage disturbances and breaches of the peace. Defendant excepted to both of said instructions.

D. & D. J. Clark, for the plaintiff.

Morrison and Fitch, for the defendant.

By Court, GILCHRIST, C. J. Several cases have been cited by the counsel of the defendant, to show that the ruling of the court was incorrect. Among them is the case of *Regina v. Barker*, 1 Car. & Kir. 254. In that case the prisoner was indicted under the statute of 7 Wm. IV. and 1 Vict., c. 85, for attempting to discharge a loaded pistol. Rolfe, B., told the jury that they must consider whether the pistol was in such a state of loading that under ordinary circumstances it would have gone off, and that the statute under which the prisoner was indicted would then apply. He says, also: "If presenting a pistol at a person, and pulling the trigger of it, be an assault at all, certainly in the case where the pistol is loaded, it must be taken to be an attempt to discharge the pistol with intent to do some bodily injury."

From the manner in which this statement is made, the opinion of the court must be inferred to be, that presenting an unloaded pistol is an assault. There is nothing in the case favorable to the defendant. The statute referred to relates to loaded arms.

The case of *Regina v. James*, 1 Car. & Kir. 529, was an indictment for attempting to discharge a loaded rifle. It was shown that the priming was so damp that it would not go off. Tindal, C. J., said: "I am of opinion that this was not a loaded arm within the statute of 1 Vict., c. 85; and that the prisoner can neither be convicted of the felony nor of the assault. It is only an assault to point a loaded pistol at any one, and this rifle is proved not to be so loaded as to be able to be discharged."

The reason why the prisoner could not be convicted of the assault is given in the case of *Regina v. St. George*, 9 Car. & P. 483, where it was held that on an indictment for a felony, which includes an assault, the prisoner ought not to be convicted of an assault which is quite distinct from the felony charged, and on such an indictment the prisoner ought only to be convicted of an assault which is involved in the felony itself.

In this case, Parke, B., said: "If a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."

So if a person present a pistol, purporting to be a loaded pistol, at another, and so near as to have been dangerous to life if the pistol had gone off, *semble* that this is an assault, even though the pistol were in fact not loaded: *Regina v. St. George, supra*.

In the case of *Blake v. Barnard*, 9 Car. & P. 626, which was trespass for an assault and false imprisonment, the declaration alleged that the pistol was loaded with gunpowder, ball, and shot, and it was held that it was incumbent on the plaintiff to make that out. Lord Abinger then says, "If the pistol was not loaded, it would be no assault," and the prisoner would be entitled to an acquittal, which was undoubtedly correct under that declaration, for the variance: *Regina v. Oxford*, Id. 525. One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, each of us shall feel secure against unlawful assaults. Without such security, society loses most of its value, peace, and order; and domestic happiness, inexpressibly more precious than mere forms of government, can not be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And it surely is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening manner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate with the injury sustained, would certainly lead the ill-disposed to consider an assault as a thing that might be committed with impunity. But at all events, it was proper for the jury to consider whether such a result would or would not be produced: *Flanders v. Colby*, 28 N. H. 34.

Judgment on the verdict.

"If, WITHIN SHOOTING-DISTANCE, ONE MENACINGLY POINTS AT ANOTHER WITH GUN, apparently loaded, yet not loaded in fact, he commits an assault the same as if it were loaded:" 2 Bish. Crim. L., sec. 32, citing the

principal case; together with *State v. Smith*, 2 Humph. 457; *Regina v. St. George*, 9 Car. & P. 483; *State v. Shepherd*, 10 Iowa, 126; *Commonwealth v. White*, 110 Mass. 407. He cites other cases, however, which hold a different doctrine.

ADAMS v. HACKETT.

[27 NEW HAMPSHIRE, 289.]

SURVIVING PARTNER OF TWO DIFFERENT FIRMS MAY JOIN IN ONE ACTION counts for sums due him as the surviving partner of each of said firms, and a count for money due him in his individual capacity.

PROMISSORY NOTE IS PRIMA FACIE EVIDENCE OF GOOD CONSIDERATION, and imports such until the contrary is shown; hence, evidence that part of a claim in the settlement of which a note was given was illegal would be insufficient, as the credits allowed might have covered the illegal part. That part of the consideration which was illegal must be distinctly shown.

CONSTITUTIONAL LAW.—A license to sell liquor for one year from April 1, 1849, was taken out under an existing law; July 6, 1849, the law under which the license was issued was repealed: *held*, that money due for liquor sold under the above license, after the passage of the second law, was a good consideration for a note, as the second law, so far as it interfered with vested rights, was retroactive and unconstitutional.

ILLEGAL CONSIDERATION.—Sale of liquor to be used as a beverage, and for resale at a bar, under a license "to sell wine and spirituous liquors for medical, mechanical, and chemical purposes, and for no other use or purpose," is illegal, and raises no consideration which can be enforced.

ACTION of *assumpsit* upon a promissory note, payable to J. G. Bancroft & Co., dated August 10, 1849; also upon an account for articles sold defendant by the firm of G. A. & J. Q. Adams, in the sum of six dollars and ninety cents; also upon an individual account. The account was committed to an auditor, whose report found the facts and raised the questions recited in the opinion.

Emerson, for the plaintiff.

Morrison and Fitch, for the defendant.

By Court, EASTMAN, J. As we understand the declaration in this case, it is founded upon promises made to the plaintiff as surviving partner of the firm of J. G. Bancroft & Co., and as surviving partner of the firm of G. A. & J. Q. Adams, and also upon promises to the plaintiff in his individual capacity. And the objection is taken by the defendant that these are different causes of action, which can not be joined in one suit.

We suppose the objection is, not that the causes of action are

of a different nature and therefore can not be joined, but that they accrue in different rights; that is, that here is a cause of action in favor of the firm of J. G. Bancroft & Co., and another in favor of G. A. & J. Q. Adams, and still another in favor of George A. Adams individually, and that the three can not be united in one suit.

It is not disputed that the plaintiff is the surviving partner of the two firms, and it is well settled that where a firm consists of two persons, and one of them dies, the rights of action which were vested in the firm survive to the remaining member: not to him as to an administrator or executor, representing another person, but as the survivor of the partnership representing himself, and being all that is left of the firm. The cause of action is in him; and hence it has been often held that in an action at the suit of a surviving partner, he may include a count for a debt due to himself in his own right, as both causes of action are in him: *Slipper v. Stidstone*, 5 T. R. 493; *French v. Andrade*, 6 Id. 582; *Golding v. Vaughan*, 2 Chit. 436; *Richards v. Heather*, 1 Barn. & Ald. 29; *Smith v. Barrow*, 2 T. R. 476.

On the death of one of two or more joint obligees, promisees, etc., the action must be brought by the survivor, or if there be more than one, by all the survivors: *Martin v. Krump*, 2 Salk. 444; *Kemp v. Andrews*, Carth. 170; *Wilton v. Hamilton*, 1 Bos. & Pul. 445; *Cabell v. Vaughan*, 1 Saund. 291, note 4. The remedy at law survives entire to the surviving obligee or promisee, who receives the share of the deceased in the avails of the suit, as trustee to his personal representatives, and must account for it with them: *Martin v. Crompe*, 1 Ld. Raym. 340; *West v. Skip*, 1 Ves. sen. 242; S. C., Id. 456; Toller on Executors, 155, 163, 444.

As it is clear, upon authority, that a surviving partner may, in an action brought by him as such survivor, include in his declaration a count for a debt due to himself in his own right, no reason occurs to us why he may not also, in the same suit, join another count for a debt accruing to him as survivor of another firm. The causes of action are all in him, and the principle in the one case must be the same as in the other. This objection of the defendant must therefore fail.

The plaintiff seeks to recover—1. The note given by the defendant to Bancroft & Co.; 2. An account of the firm of G. A. & J. Q. Adams against the defendant; and 3. A claim due the plaintiff in his individual right.

In regard to the note, the defense is, that it was given in part

for liquors sold in violation of law. As applicable to this point, the case finds that on the thirty-first day of March, 1849, J. G. Bancroft & Co. were duly licensed to sell spirituous liquors for any purpose for the term of one year, and the license was duly recorded. After they were licensed, and before the tenth day of August, 1849, the day on which the note was made, they had sold the defendant goods, mostly liquors, and on settlement the note was given. A small part only of the liquor was sold after the sixth of July, 1849, when the act under which the license was granted was repealed.

Now, although it may be probable from this statement that a small amount was included in the note for liquors sold after July 6, 1849, yet that fact is not distinctly found. The note was given on a settlement, and there may have been credits, which were applied by the parties at the time, for the payment of the liquors sold after July 6, 1849. A promissory note is *prima facie* evidence of a good consideration, and imports a consideration until the contrary is shown: *Horn v. Fuller*, 6 N. H. 511; 2 Stark. Ev. 280; *Goshen and Minisink T. R. Co. v. Hur- tin*, 9 Johns. 217 [6 Am. Dec. 273]. The illegality of the consideration should be made clearly to appear before the note is held to be void.

But assuming that a part of the consideration of the note was for liquors sold after the passage of the act of July, 1849, still we are of opinion that it may be recovered. Bancroft & Co. had a general license, authorizing them to sell until April 1, 1850. It was a license granted by virtue of law. It had cost them a consideration to make it perfect, the fees for recording; and although the amount is very trifling, still it was a consideration. They had acquired rights under their license which had become fixed, the right to sell according to the terms of the license, until April following; and so far as these rights were concerned, the law of July 6, 1849, would be retrospective and of course inoperative. Statutes which take away or impair vested rights, acquired under existing laws, are retrospective and unconstitutional: *Dow v. Norris*, 4 N. H. 16 [17 Am. Dec. 400]; *Society v. Wheeler*, 2 Gall. 139; *Gilman v. Cutts*, 23 N. H. 382, and cases cited.

But the other matters sued for can not be recovered. The whole amount, except the six dollars and ninety cents, was for liquors attempted to be sold under a license granted by virtue of the act of July 6, 1849. The case finds that these liquors were sold under a license granted by the selectmen of Nashua,

by virtue of the act of July 6, 1849, to George A. & J. Q. Adams, "to sell wine and spirituous liquors, for medicinal, mechanical, and chemical purposes, and for no other use or purpose;" that they were all sold for a purpose different from either of those mentioned in the license; that they were sold to be used by the defendant as a beverage, and to be sold again to such persons as wished to purchase them of him for any purpose.

Now, it is perfectly apparent that these sales were not for either of the purposes specified in the license. The liquors were not sold to be used for medicinal, mechanical, or chemical purposes, but to be used by the defendant as a beverage. The sale was therefore in violation of the general statute, and being illegal, it raises no consideration which can be enforced.

The court had occasion to put a construction upon this statute in the case of *State v. Perkins*, 26 N. H. 9, and it was there held that if a person having a license to sell for the purposes specified in the act of July, 1849, should sell for other purposes, he was indictable for the offense in the same manner as before the passage of the act; that a license under the statute of July, 1849, was a limited one, and conferred no general powers to sell for all purposes. These sales, then, were made contrary to law, and the account can not be recovered.

As to the six dollars and ninety cents, the payments made by the defendant far exceeded that sum, and that account is thus canceled. This disposes of the whole matter, and the result consequently is, that the plaintiff must have judgment for the amount of the note and interest.

Judgment for the plaintiff.

RIGHTS CREATED BY ACT OF LEGISLATURE, being equivalent to a contract executed, can not be impaired by a subsequent legislature: *Winter v. Jones*, 54 Am. Dec. 379. See also 2 Parsons on Contracts, 704, note.

THE PRINCIPAL CASE IS CITED to the point that a promissory note imports a consideration until the contrary is shown, in *Coburn v. Odell*, 30 N. H. 552; and in *Chesley v. Chesley*, 37 Id. 242. It is also cited to the point that laws which are retroactive in their operation are unconstitutional and void, in *Rockport v. Walden*, 54 Id. 174; *Pembroke v. Epsom*, 44 Id. 114. It is cited in *Rich v. Flanders*, 39 Id. 365, to the point that laws which are retroactive only to the extent of taking away part of a remedy, or modifying it in some way, are not unconstitutional. The principal case, however, hardly appears to be an authority upon this point. In the case of *State v. Holmes*, 38 Id. 225, the constitutionality of the act of July 6, 1849, came squarely before the court. It was there decided that a license to sell liquor under this act gave no vested rights, and was revoked and annulled by the repeal of that statute. This is somewhat opposed to the rule of the principal case;

and the court, in commenting upon it, said: "This question arose incidentally in *Addms v. Hackett*, but the point does not appear to have been material to the decision of that case; and we do not feel pressed by that authority." See also *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 282, upon the power of the legislature to revoke a grant.

DREW v. TOWLE.

[27 NEW HAMPSHIRE, 412.]

TOTAL FAILURE OF CONSIDERATION IS GOOD DEFENSE to an action on a promissory note, and a partial failure will be an answer *pro tanto*, if the amount of such deduction is to be ascertained by mere computation.

DAMAGES FOR BREACH OF COVENANTS IN DEED MAY BE SET OFF in an action of *assumpsit* for the consideration, where the amount of such damages is to be ascertained by mere calculation.

SET-OFF.—A claim for uncertain or unliquidated damages can never be used as a set-off.

TRUSTEE WHO APPEARS IN TRUSTEE PROCESS MAY BE CHARGED for the entire debt and costs recovered by the creditor against the principal debtor, if he has that amount in his hands after the costs allowed him by the court have been deducted, even though that sum exceeds the amount the officer is directed to attach by the trustee writ.

TRUSTEE WHO MAKES DEFAULT IN TRUSTEE PROCESS is chargeable only for the sum named in the writ.

IN TRUSTEE PROCESS, GENERALLY, TRUSTEE HAS NO CLAIM FOR INTEREST paid on the execution, or for officer's fees paid by him. He is discharged only to the amount of the costs allowed him and the amount of the judgment rendered against him.

THAT TRUSTEE PROCESS SUIT IS PENDING IS NO CAUSE why a writ by the principal debtor against the trustee should be abated.

PAYMENT OF DEBT BY TRUSTEE, AFTER BEING CHARGED THEREFOR in a trustee process, may be taken advantage of under the general issue, and without a plea *puis darrein continuance*.

ASSUMPSIT upon three promissory notes. Two of them were dated November 30, 1847, made by the defendant and payable to plaintiff, each for two hundred dollars; one payable in one year from date, and the other in two years therefrom. The third note needs no further mention. The declaration, which contained five different counts, asked judgment for sundry claims for different amounts, but the only claims to support which any evidence was given were the three notes above mentioned. At the trial the plaintiff produced the above notes, and the signatures were admitted. Defendant then offered to show that the considerations of the first two notes arose in an arbitration agreement and transaction as follows: December 28, 1846, plaintiff Mercy K. Drew and defendant Amos Towle entered into

an agreement to refer to arbitration sundry matters, with a penalty of five hundred dollars for the performance of the award. Among other things which the arbitrators were to do, was to appraise a twenty-nine-acre tract of land, of which plaintiff was seised and possessed. One half of the appraised value of this tract was to be deducted from the appraised sum. They were also to appraise a sixty-two-and-one-half-acre tract, and to make a like deduction. Plaintiff then, in pursuance of this arbitration agreement, conveyed said two tracts of land to defendant, by a deed containing the usual covenants of warranty. Defendant, in payment therefor, paid one hundred dollars in cash, and the two notes first above mentioned. Defendant then offered to prove that plaintiff had no title whatever to the sixty-two-and-one-half-acre tract, and asked that the amount he had paid therefor, together with the interest thereon, be allowed by way of set-off against plaintiff's claim. Defendant further offered to prove that a deception had been practiced upon the arbitrators, and consequently upon him, in the valuation of the twenty-nine-acre tract. He offered to show that a different tract from that owned by plaintiff had been exhibited to the arbitrators, and that the tract which plaintiff really owned contained but about ten and one half acres. Defendant claimed to have the right to set off the fair value of the difference between twenty-nine acres and ten and one half acres, or the average value fixed per acre therefor, against the amount of said two notes. Plaintiff objected to the introduction of evidence upon either of the above points. Defendant further offered to prove that in January, 1850, a suit had been commenced against Mercy K. Drew and himself as her trustee. The writ in this case commanded the sheriff to attach property in the hands of said defendant, the property of said Drew, to the value of one hundred dollars. When this suit came on for trial judgment was rendered against Towle as trustee for the sum of one hundred and nineteen dollars and eighty-four cents, and his costs were taxed at ten dollars and fifty cents. Upon this judgment an execution was issued, which was paid by Towle. He also paid sixty cents interest upon the judgment, and three dollars and eighteen cents officer's fees. Defendant claimed a right to have the amount of this judgment, interest, and costs allowed him as a set-off in this action. Plaintiff objected to the introduction of this evidence, claiming that the pendency of the trustee suit should have been pleaded in abatement; also that the judgment was erroneous, exceeding the one hundred dollars attached in the trustee's hands;

and finally, that neither the costs nor the interest nor the officer's fees should be allowed as a defense to this action.

Hatch, for the plaintiff.

Small, for the defendant.

By Court, BELL, J. Upon the question of failure of consideration as a defense to a promissory note, the rule generally adopted elsewhere is well laid down in Bayley on Bills, 393. "A total failure of consideration is where it can be insisted on as a total bar; inadequacy or a partial failure, a bar *pro tanto* only. If a bill or note is given, either wholly or as to a specific part, as the consideration of a special contract, and that contract either fails *in toto* or is *in toto* rescinded, it will be an answer to an action on the bill or note, either wholly or *pro tanto*, if the plaintiff stands in a position which makes him liable to such a defense. But the partial failure of consideration will constitute no defense, if the *quantum* to be deducted on that account is matter not of definite computation, but of unliquidated damages, unless the contract was rescinded on that ground."

The same rule is laid down substantially in 1 Saund. Pl. & Ev. 303; 1 Steph. N. P. 929; 1 Leigh N. P. 474; and in Story on Prom. Notes, sec. 187; 2 Greenl. Ev., sec. 199, and many authorities cited.

The reported cases in New Hampshire show that the rule thus stated has been recognized and adopted here.

In *Copp v. Sawyer*, 6 N. H. 386, it was held that a want of consideration is a good defense to a promissory note, in a suit between the original parties to it; and the same principle is stated in *Reed v. Prentiss*, 1 Id. 174 [8 Am. Dec. 50].

In the last case, it is said by Woodbury, J., that mere failure of consideration is no defense to an action on a promissory note. But the case was decided upon the point that there was no failure of consideration, inasmuch as the whole article, which was the consideration of the note, passed by a valid title to the purchaser, and it was not shown that there was any warranty of the quality or deceit practiced in the sale.

In *Earl v. Page*, 6 N. H. 477 [26 Am. Dec. 711], it was held that where a note has been partially paid, a failure of consideration to a greater amount than the balance due was a bar to the action.

In *Haseltine v. Guild*, 11 N. H. 390, it was held that a promissory note for a certain sum given to indemnify a surety in a

probate bond, and to enable him to secure himself by attachment, was good to the amount actually paid upon the bond by the surety at the time of the judgment, and that for the balance the consideration must be held to have failed. This case clearly recognizes the principle that a partial failure of consideration is in some cases a defense *pro tanto* to a promissory note.

In *Chase v. Weston*, 12 N. H. 413, it is said by Upham, J., that on the ground of authority a mere partial failure of consideration of a note arising from a breach of covenants of warranty in a conveyance of land will not constitute a defense; but the point was not decided, because the maker of the note had assigned over the covenants.

In *Fletcher v. Chase*, 16 N. H. 38, the same point was decided; and in *Sanborn v. Osgood*, Id. 112, it was held that a partial failure of consideration, arising from the fraud of the seller, is no defense to a promissory note, unless the entire contract is rescinded.

In *Rumsey v. Sargent*, 21 Id. 397, it was held that where the seller agreed to refund the price of an article sold if it did not give satisfaction, the failure of the article to answer its purpose was a good defense to a note given for the price of it.

We have seen no report of the case of — v. *Swett*, cited by the plaintiff's counsel, but, as stated by him, it seems consistent with the other decisions cited. It may be fairly inferred that the defendant, having chosen not to avoid nor rescind the contract of sale, but to retain the property notwithstanding its defects, had reduced his claim from a total failure of consideration to a partial failure, in which case the amount of the failure must depend upon the ascertainment of unliquidated damages.

In the present case, as to the tract of sixty-two and a half acres, the failure of consideration is total, and the amount readily ascertained by mere computation; it therefore falls within the principle of *Haseltine v. Guild*, *supra*. As to the other tract, the case is one of partial failure only, and the amount entirely unliquidated; and it is therefore no defense within the principle of *Chase v. Weston*, *Fletcher v. Chase*, and *Sanborn v. Osgood*, *supra*, and the defendant must seek his indemnity by his action upon his covenants.

The same test, we think, will apply to the question whether damages for the breach of the covenants in a deed may be set off in an action of *assumpsit* for the consideration. Where the failure of title is total, and the remedy is to be sought on the breach of the covenant of seisin, the rule of damages is definite,

to wit, the value of the property as shown by the consideration paid and the interest: *Parker v. Brown*, 15 N. H. 176; and they may be ascertained by numerical calculation alone, and may, therefore, properly be allowed as a set-off. In actions on the covenant of warranty the same rule of damages is adopted here: *Willson v. Willson*, 25 Id. 229 [57 Am. Dec. 320]; and the same principle of set-off may apply, and in many cases a similar principle will be applicable on the covenant against incumbrances where the incumbrance has been removed: *Loomis v. Bedel*, 11 Id. 74.

Where the damages upon any breach of covenant are uncertain and unliquidated, they can not, we think, form the subject of a set-off. The language of the revised statutes differs from that of the English statute of 8 Geo. II., c. 24, sec. 4. The latter says: "Whenever there are mutual debts between the plaintiff and defendant, etc., one debt may be set off against the other." Section 6, chapter 187, of the revised statutes provides that "if there are mutual debts or demands between the plaintiff and defendant at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other."

The first provincial statute of 1765 followed the terms of the 8 Geo. II., Prov. Stat. 1771, 195. The change of phrase was made in the revision of 1791, Stat. 1815, 172. So far as I have found, there is no reported decision relative to the construction and effect of our statute.

Under the English statute, "if the claim of either party consists of uncertain or unliquidated damages, a set-off is not allowed:" 1 Leigh N. P. 153; Bull. N. P. 161; Montagu on Set-off, 13. But an unliquidated demand capable of being reduced to a certainty by a simple calculation may be set off: Leigh N. P. 160; *Gibson v. Bell*, 1 Bing. N. C. 743; *Rose v. Sims*, 1 Barn. & Adol. 526; 2 Saund. Pl. & Ev. 790; 1 Bouv. Inst. 327.

In *Hepburn v. Hoag*, 6 Cow. 613, the question arose as to the effect of the word "demands" in the New York statute, relative to set-offs, and it was decided that the insertion of this word did not change the law so as to give a party the benefit of uncertain damages by way of set-off.

Such, we think, has been the practical construction of our own statute, and that debts, properly speaking, or demands capable of liquidation by mere computation, and no others, have ever been allowed as the subjects of set-off.

The damages arising from the covenants relative to the sixty-two and a half acres may be set-off; but those which relate to

the smaller tract being uncertain, and necessarily to be assessed by a jury, can only be recovered in a distinct action.

By the revised statutes, chapter 193, section 15, a form of process is prescribed in trustee cases. By it the sheriff is required to attach the goods, etc., of the debtor, in the hands, etc., of the trustee, to the value of — dollars, and summon the trustee to appear, etc., and show cause why execution should not issue against him for the damages which may be recovered by the plaintiff against the principal defendant.

The question is raised in this case, whether the plaintiff can recover more than the amount required by the writ to be attached, if it appears that the trustee has more in his hands.

By section 5 of chapter 221, "if the trustee makes default, the charge of having in his hands money, etc., of the principal defendant to the amount alleged in the process shall be taken to be true, and judgment shall be rendered against the trustee, not exceeding the amount alleged in such process."

By section 7, every person summoned as trustee, as aforesaid, may be put to answer interrogatories as to his liability as such trustee, etc.

By section 8, every such trustee, having in his possession any money, etc., of the defendant at the time of the service of such writ upon him, or at any time after such service and before his disclosure, shall be adjudged trustee therefor.

These provisions appear to us to show that, although upon a default, the trustee shall be charged only for the amount alleged in the process to be in his hands; yet upon disclosure, or trial by jury, if it appears that he has property of the principal defendant in his possession, whether it was attached on the process or not, he shall be charged for it.

In that case, as between these parties, the amount alleged in the process is immaterial. Being thus chargeable for all that he has in his possession, the court may order a judgment for the trustee for his costs, to be retained out of the property in his hands, and for the creditor for the amount of his judgment against the principal debtor, whether debt or costs, not exceeding the surplus, after deducting the trustee's costs from the amount in his possession.

By section 35, "in all cases where the trustee has not been guilty of fraud or unreasonable delay, he shall be entitled to his costs, and the court may order the same to be deducted from the amount for which said trustee shall be adjudged chargeable, or may render judgment and issue execution therefor," etc.

In this case, the trustee appeared, and the judgment was not probably rendered on a default, and if not, the judgment seems to be regular, notwithstanding the exception taken.

Probably the view of the defendant may be correct, that as she was not a party to the proceeding against the trustee, had no right to be heard, and had no remedy by error to reverse or correct the proceedings, she has the right to avail herself of any defect of the judgment collaterally: *Puffer v. Graves*, 26 N. H. 256. Such judgment, though conclusive upon parties, is not so as to strangers or third persons: *Thrasher v. Haines*, 2 Id. 444.

As to the question of interest on the execution against the trustee, and the officer's fees, as a general rule that is a matter between the creditor and the trustee, with which the debtor has nothing to do. The trustee is discharged for the amount of the judgment against him, so far as the debtor is concerned, and no more. This seems to be made clear by section 30, which provides that when any person shall be adjudged a trustee of any debtor as aforesaid, except where it is otherwise specially provided, judgment shall be rendered and execution issued against such trustee, his own goods and estate therefor, etc., in the same manner as if such writ were brought against him personally.

In cases where a special provision is made, as in sections 10 to 14, a different rule may be applicable, but that question does not arise here.

In *Wadleigh v. Pillsbury*, 14 N. H. 373, it was decided that the pendency of an action against a debtor, as trustee of the creditor, is not a good plea in abatement to an action by the creditor. And by section 38, any trustee from whose possession any money, etc., shall be taken by the trustee process may, if sued therefor, plead the general issue, and give the special matter in evidence under it. It was not, therefore, necessary to plead, in this case, any plea *puis darrein continuance*.

As, then, a part of the evidence offered ought to have been received, the case must be sent to a new trial.

PARTIAL FAILURE OF CONSIDERATION OF NOTE, given in part payment for land sold, arising out of misrepresentations respecting the quantity of standing timber-trees thereon, may be given in evidence in defense to an action upon the note: *Hamnett v. Emerson*, 46 Am. Dec. 598, and note; *Brewer v. Harris*, 41 Id. 587, and note; *Smith v. Busby*, 57 Id. 207.

SET-OFF.—In an action for the price of articles sold, the defendant, by way of equitable defense, may give evidence of a warranty of the articles, and a breach thereof: *Steigleman v. Turner*, 15 Am. Dec. 631; see also *Peden v. Moore*, 21 Id. 649. Unliquidated damages can not be set off: *Christian v. Miller*, 23 Id. 251; *Gogel v. Jacoby*, 9 Id. 339.

KIMBALL v. COCHECHO RAILROAD.

[27 NEW HAMPSHIRE, 448.]

WAY BY NECESSITY.—Where one conveys land to which there is no access, except over his remaining lands or over lands of a stranger, a right of way exists by necessity over such lands of the grantor.

CASE for the disturbance of plaintiff's right of way. One Ephraim Ham was the owner of what was known as the "mill lot," in April, 1803. He was also owner of a field directly north of the mill lot, known as the "factory field." Directly north of the factory field was the tract of land first owned by plaintiff, and still owned by him. The mill-lot farm was sold in April, 1803, to Hanson Varney, and in August of the same year was sold by Varney to plaintiff. Ham afterwards disposed of his interest in the factory field. The defendants, a railroad corporation, duly laid out the road in accordance with law, and over the place used by plaintiff as a right of way they built a bridge. Defendants never had tendered to plaintiff a right of way over this bridge, nor had he ever used it. A verdict was taken for defendants below, subject to the opinion of this court.

Kimball and Soule, for the plaintiff.

Woodman, for the defendants.

By Court, GILCHRIST, C. J. It has been held that if A. have an acre of ground in the middle, and surrounded by other of his grounds, and enfeoff B. of that acre, here of necessity a convenient way arises on B.'s behalf to go over A.'s ground as a necessary incident: *Oldfield's Case*, Noy, 123.

It is the same though the close aliened be not totally inclosed by the grantor's land, but partly by the land of strangers, for the grantee may not go over the stranger's land: 2 Roll. Abr. 60. The reason given is, because it is for the public good that the lands should not remain unoccupied: *Dutton v. Tylor*, 2 Lutw. 1487; *Howton v. Frearson*, 8 T. R. 50.

It is said in the plaintiff's argument that the only way of access to the mill lot is over that part of the factory field which was the property of those under whom the plaintiff holds the mill lot, and by whom it was owned at the time of the conveyance of the mill lot to him, or over land at that time owned by third persons, and for the last twenty years or more a part of the same factory field.

In the case of *Pernam v. Wead*, 2 Mass. 203 [3 Am. Dec. 43], it was held that if a judgment creditor extends his execution

on a part of his debtor's land, so as to leave him no passage from the remainder of the land to the highway, the law gives him a way of necessity over the land extended upon. It was said by Parker, J., that the creditor "might have taken the land in the rear with the house, or he might have left a passageway for the debtor and had more land set off to him in lieu of that so left. He therefore must be considered as having chosen to take the whole front of the debtor's land, knowing at the time that he shut him from all communication with the private or public ways of the town."

It was alleged in the declaration that the plaintiff had no other way from his dwelling-house and close, described in the declaration, to the street or highway and back but through and over the premises so extended upon by the said execution, without trespassing upon the lands of others in which he had no right.

It is unnecessary to determine the question whether the plaintiff had a way by prescription. He had a way by necessity, and is therefore entitled to recover, and the defendants can not retain the verdict.

Verdict set aside.

WAY BY NECESSITY, WHEN EXISTS: See *Pernam v. Wead*, 3 Am. Dec. 43; *Taylor v. Townsend*, 5 Id. 107; *Gayetty v. Bethune*, 7 Id. 188; *Lawton v. Rivers*, 13 Id. 741; *Turnbull v. Rivers*, 15 Id. 622; *Tucker v. Tower*, 19 Id. 350; *Brown v. Burkenmeyer*, 33 Id. 541; *Nichols v. Luce*, 35 Id. 302; *Cooper v. Maupin*, Id. 456; *Collins v. Prentice*, 38 Id. 61, and the notes to above cases.

LEIGHTON v. SARGENT.

[27 NEW HAMPSHIRE, 460.]

PHYSICIAN OR SURGEON, WITHOUT SPECIAL CONTRACT FOR PURPOSE, never stipulates for the successful conclusion of his services, nor is he ever a warrantor or insurer.

PHYSICIAN'S OR SURGEON'S IMPLIED CONTRACT WITH HIS EMPLOYER IS, that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science; that he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge; that he will use his best judgment as to the treatment of the case intrusted to his charge.

PHYSICIAN OR SURGEON SHOULD BE CHARGED WITH CONSEQUENCES OF ERRORS only where such errors could not have arisen except from want of reasonable skill or diligence.

PHYSICIAN IS NOT RESPONSIBLE FOR ERRORS OF JUDGMENT as to the proper treatment to apply in a particular case.

EVIDENCE THAT PERSON ACCUSED OF NEGLIGENCE AND UNSKILLFULNESS in the treatment of a broken ankle was educated at a medical school of high repute, was a regularly educated and skillful physician and surgeon, is proper and should be admitted.

TRESPASS on the case against the defendant, a physician and surgeon. The declaration charges that on the first day of September, 1850, plaintiff employed defendant to care for, set, and otherwise heal a broken or fractured ankle; that at this time defendant carried on the profession of physician and surgeon; that the said defendant undertook to cure said fracture, but that he so negligently, carelessly, and unskillfully behaved and governed himself in the care of said fractured ankle, "that for the want of skill and the proper application of splints, and the application of proper medicaments and remedies thereto, and by and through the mere neglect, default, and unskillfulness of the said defendant," said ankle became inflamed and swollen, stiff and deformed, and fixed in an unnatural position, and that the same became incurable. At the trial, in reply to evidence offered by plaintiff tending to show unskillful and improper treatment by the defendant, defendant offered to prove that he had received a good medical and surgical education, that he was a regularly educated and skillful physician and surgeon, that he had attended a course of instruction in surgery, and that he had otherwise received good scientific tuition in surgery. This evidence was rejected by the court, upon the objection of plaintiff. The jury returned a verdict of one thousand five hundred dollars for plaintiff, and defendant took this appeal.

Wiggins and Wells, and Peavey, for the plaintiff.

Christie and Kingman, and Parsons, for the defendant.

By Court, BELL, J. The first question raised by this case relates to the admissibility of the evidence offered by the defendant, that he had received a good medical and surgical education, and was a regularly educated and skillful surgeon and physician. At the first look, it would not seem that the decision of this question could involve the discussion of the principles upon which the action is maintained. But as our conclusion upon this incidental question rests upon those principles, we propose to state them at such length as clearly to show the points upon which we rest our decision. These principles are of great consequence to all the classes of professional men who are

employed by others to transact business requiring especial skill and knowledge. The duties and responsibilities of all these classes, as those of lawyers and physicians, engineers, machinists, ship-masters, builders, brokers, etc., are governed by the same general rules: 1 Bouv. Inst. 403. These rules it is important should be settled and well understood, since there are times when the verdicts of juries tend to release professional men from even a reasonable responsibility, as there are others when they seem to hold every man who offers his services in any of the professions to an overrigid accountability, and to make him little less than a warrantor or insurer of the success of every business in which he engages. At the present moment, it is to be feared there is a tendency to impose some perilous obligations beyond the requirements of the law upon some classes of professional men.

What, then, is the contract of the professional man with his employer in regard to his qualifications and his conduct? Or, since this contract is one implied by the law, what are the duties and obligations of the professional man recognized by the law in these respects?

And here it may be laid down broadly, that without a special contract for that purpose he is never a warrantor nor insurer: *Hancke v. Hooper*, 7 Car. & P. 81. He never stipulates for success, at all events, and he is never to be tried by the event.

By a special contract for that purpose he may bind himself, not merely to the exercise of skill, care, and diligence, but to be responsible for results. He may undertake to do certain things, as, for example, a builder may agree to build a house or a ship of a certain description, and he then can not excuse himself on the ground of his want of sufficient skill. In that case the maxim of the civil law applies, *Spondet peritiam artis*. So a surgeon may contract for the removal of a limb, the physician for the cure of a disease, or the lawyer for the foreclosure of a mortgage, and by such a contract he becomes a guarantor of the result. He must be understood to have engaged to use a degree of diligence and attention and skill adequate to the performance of his undertaking. It is his own fault if he undertakes without sufficient skill or applies less than the occasion requires. In that case, *imperitia culpæ adnumeratur*. It is in these cases alone, either of express contract to do certain work or to accomplish certain results, or where such contract is necessarily implied, that the rule of the civil law, quoted as above by the elementary writers, has any application here: Story on

Bailments, 279; Chit. Con. 165; 3 Bla. Com. 122; 2 Greenl. Ev. 144; 1 Bouv. Inst. 403.

By our law, a person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill contracts with his employer.

1. That he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business. In the language of Story, J.: "In all these cases where skill is required, it is to be understood that it means ordinary skill in the business or employment which the bailee undertakes for. For he is not presumed to engage for extraordinary skill, which belongs to a few men only, in his business or employment, or for extraordinary endowments or acquirements. Reasonable skill constitutes the measure of the engagement in regard to the thing undertaken:" Story on Bailments, 433. Or, as it is said by Tindal, C. J., *Lanphier v. Phipos*, 8 Car. & P. 475: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that you will at all events gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a reasonable, fair, and competent degree of skill."

This principle of the common law, as to the engagement of the professional man for a reasonable degree of skill and no more, has been settled in the case of attorneys, in *Pitt v. Yalden*, 4 Burr, 2060; *Laidler v. Elliott*, 3 Barn. & Cress. 738; S. C., 5 Dow. & Ry. 635; *Russell v. Palmer*, 2 Wils. 325; *Hunter v. Caldwell*, 16 L. J. Q. B. 274; S. C., 11 Jur. 770, and 10 Q. B. 69; *Purves v. Landell*, 12 Cl. & Fin. 91; *Varnum v. Martin*, 15 Pick. 440; *Stimpson v. Sprague*, 6 Greenl. 470; *Crooker v. Hutchinson*, 1 Vt. 73; *Holmes v. Peck*, 1 R. I. 242; *Wilson v. Russ*, 20 Me. 421; 1 Leigh N. P. 196; 2 Greenl. Ev. 120; 1 Saund. Pl. & Ev. 163; Chit. Con. 165.

In the case of physicians and surgeons, in *Seare v. Prentice*, 8 East, 347; *Slater v. Baker*, 2 Wils. 359; *Moore v. Mourgue*, 2 Cowp. 479 [not in point—Ed. Am. Dec.]; *Hancke v. Hooper*, 7

Car. & P. 81; *Lanphier v. Phipos*, 8 Id. 475; *Grannis v. Branden*, 5 Day, 260 [5 Am. Dec. 143]; *Landon v. Humphrey*, 9 Conn. 209 [23 Am. Dec. 333]; *Howard v. Grover*, 28 Me. 97 [48 Am. Dec. 478]; *Gallaher v. Thompson*, Wright, 466; *Mertz v. Detweiler*, 8 Watts & S. 376; 1 Saund. Pl. & Ev. 91; *Ren v. Kildesby*, 1 Wm. Saund. 312, note 2; 1 Bouv. Inst. 403; Bell's Com. 459; and as to other employments, in *Powtnary v. Walton*, 1 Roll. Abr. 92; Bull. N. P. 73; Story on Bailments, 280, sec. 429; Paley on Agency, 78; *Philips v. Wood*, 1 Nev. & M. 434.

2. In the second place, the professional man contracts that he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge, to accomplish the purpose for which he is employed. He does not undertake for extraordinary care or extraordinary diligence, any more than he does for uncommon skill. The general rule is well settled, as in other cases of contracts supposed to be mutually beneficial to the parties, that the contractor for services to be performed for another agrees to exert such care and diligence in his employment as men of common care and common prudence usually exert in their own business of a similar kind. He agrees to be responsible for the want of such care and attention, and he stipulates in no event, without an express contract for that purpose, for any greater liability. See the cases before cited, and *Kilsley v. Williams*, 5 Barn. & Ald. 820; *Patterson v. Gandasequi*, 15 East, 62; *Howard v. Grover*, 28 Me. 97 [48 Am. Dec. 478].

Many decisions deny the liability of professional men even to this extent, since they decide that the surgeon or the attorney shall not be held responsible, except for *lata culpa* or *crassa negligentia*, manifest fault or gross negligence: *Godefroy v. Dalton*, 6 Bing. 461; S. C., 4 Moo. & P. 149; *Purves v. Landell*, 12 Cl. & Fin. 91; *Wilson v. Russ*, 20 Me. 424; 1 Leigh N. P. 196.

Perhaps nothing more is designed to be expressed in these cases than that the defendant is only liable for the want of ordinary care.

Upon this point it might be made a question whether a medical man is not bound to apply extraordinary care, because his charge relates to the lives and health of his patients, which are to them of unequaled importance and interest. But there is no pretense that the physician is bound by any other rule in this respect than that which governs all classes of men employed in works or services requiring skill—the rule of ordinary care and diligence. There is, of course, a difference, in different cases, as

to what constitutes ordinary care, dependent upon the importance and delicacy or difficulty of the thing to be done. "Different things," says Story, borrowing a very ancient illustration, "may require very different care. The care required in building a common doorway is quite different from that required in raising a marble pillar; but both come under the description of ordinary care:" Story on Bailments, sec. 429. Such differences must exist among the cases requiring medical attention. But the common rule still applies, which requires such care and diligence as men in general, of common prudence and ordinary attention, usually apply in similar cases, and not that extraordinary care which might be applied in such a case by very careful and prudent persons.

3. In stipulating to exert his skill and apply his diligence and care, the medical and other professional men contract to use their best judgment. Few cases can be supposed where but a single course of measures alone can be adopted, and many must occur where great differences of opinion may exist as to the best course to be taken. In most cases judgment and discretion are required to be exercised. Freedom from errors of judgment is never contracted for by the attorney or the physician.

Ordinary good judgment is necessarily implied in the possession of ordinary skill, and if such share of judgment is fairly exercised, any risk from mere errors and mistakes is upon the employer alone. He, too, has judgment to exercise in the selection of the physician or the lawyer whom he will employ; and if he makes a bad selection, if he fails to choose a man of the best judgment, the result is fairly to be attributed to his own mistake, and is not to be visited upon the man who has honestly done his best endeavor in his service.

It is in accordance with these views that it has been often decided that a professional man is not responsible for errors of judgment, for mere mistakes in cases of reasonable doubt and uncertainty: *Kemp v. Burt*, 1 Nev. & M. 262; S. C., 4 Barn. & Adol. 424; *Shilcock v. Passman*, 7 Car. & P. 289; *Laidler v. Elliott*, 3 Barn. & Cress. 738; S. C., 5 Dow. & Ry. 635; *Montrion v. Jefferys*, 2 Car. & P. 113; S. C., Ry. & M. 317; *Godefroy v. Dalton*, 6 Bing. 461; S. C., 4 Moo. & P. 149; *Baikie v. Chandless*, 3 Camp. 17; *Pitt v. Yalden*, 4 Burr. 2060; *Reece v. Rigby*, 4 Barn. & Ald. 202; 1 Saund. Pl. & Ev. 63; Chit. Con. 165.

They should be charged with the consequences of mere errors only where such errors could not have arisen except from want

of reasonable skill or diligence: *Hart v. Frame*, 3 Jur. 547; S. C., 1 Rob. 595; 1 Cl. & Fin. 193.

The cases cited relate principally to attorneys, but, as has been remarked, the principles of the law on this subject apply equally to all classes of professional men. And the observations of Lord Mansfield in *Pitt v. Yalden*, 4 Burr. 2060, apply with equal force to the cases of medical men. "Attorneys who conduct themselves with honor and integrity ought to be protected, when they act to the best of their skill and knowledge. Every man is liable to error, and I should be very sorry that it should be taken for granted that an attorney is answerable for every error or mistake, and to be punished for it by being charged with the debt which he was employed to recover. A counsel may mistake as well as an attorney, yet no one would say that a counsel who had been mistaken shall be charged with the debt."

In *Percy v. Millandon*, 8 Mart., N. S., 76, Porter, J., remarks that it has been said that it will not be sufficient for a professional man to say "he acted to the best of his ability, because he should have formed a more just estimate of his own capacity before he engaged himself. This doctrine, if sound, would make an attorney responsible for every error of judgment, no matter what care or attention he exercised in forming his opinion. It would make him liable in all doubtful cases, where the wisdom or legality of one or more alternatives was presented for his consideration, no matter how difficult the subject was. But when a person who is appointed an attorney has the qualifications necessary for the discharge of the ordinary duties of the trust imposed, we are of the opinion that on the occurrence of difficulties in the exercise of it which offer only a choice of measures, the adoption of a course from which loss ensues can not make the agent responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to suppose the possession and require the exercise of perfect wisdom in fallible beings. No man would undertake to render a service to another on such severe conditions."

The uncertainty of the law is almost proverbial. Probably that of the medical profession is not less. Many sects among them entertain different and almost irreconcilable theories as to the nature and mode of treatment of disease. Among all these, it seems to be conceded that the characters and symptoms of disease vary in persons of different ages, sexes, and habits of life, and of different natural or acquired constitutions; and that

the treatment of diseases, and that of wounds and fractures, must be more or less varied with the changes of climate and seasons, and with the peculiarities of persons and places. And that cases of sickness and accident apparently similar may yet be rendered substantially different by seemingly slight circumstances, easily overlooked and sometimes difficult of detection. If this is so, the doubts and uncertainties which surround the medical and surgical practitioner, and the errors and mistakes to which he is unavoidably exposed, may well furnish a satisfactory explanation of unfavorable results, where a jury are satisfied of the reasonable skill, diligence, attention, and care exhibited in the treatment.

To charge a physician or surgeon with damages, on the ground of unskillful or negligent treatment of his patient's case, it is never enough to show that he has not treated his patient in that mode, nor used those measures, which in the opinion of others, even medical men, the case required; because such evidence tends to prove errors of judgment, for which the defendant is not responsible, as much as the want of reasonable care and skill, for which he may be responsible. Alone, it is not evidence of the latter, and therefore the party must go further, and prove by other evidence that the defendant assumed the character and undertook to act as a physician, without the education, knowledge, and skill which entitled him to act in that capacity; that is, he must show that he had not reasonable and ordinary skill; or he is bound to prove in the same way that, having such knowledge and skill, he neglected to apply them with such care and diligence as in his judgment, properly exercised, the case must have appeared to require; in other words, that he neglected the proper treatment from inattention and carelessness. The evidence in support of these two views must naturally be of a very different character.

In the present case, the declaration is entirely ambiguous, as to which of these positions the plaintiff's counsel would adopt or choose to insist upon. The declaration alleges that the injury occurred because the defendant so negligently, carelessly, and unskillfully behaved himself in and about the treatment, etc., that for want of skill, and the proper application of splints, etc., by and through the mere neglect, default, and unskillfulness of the defendant, the plaintiff was injured.

It is from this statement uncertain whether it is to be insisted that the defendant was ignorant, and knew nothing of the proper surgical treatment of such an accident as the plaintiff

had suffered; or that being properly educated and competently learned in his profession, he had acted from negligence and carelessness, contrary to what must have been his better knowledge and judgment, if he had given proper attention to the case. Nothing in the declaration confined him to either of these views; and nothing had occurred in the course of the trial to restrict the plaintiff to the point of negligence. He was therefore at liberty to take his position before the jury, that the defendant was ignorant and unskillful, or that he was negligent and careless, or, if he so pleased, that he was both unskillful and negligent. Any evidence, then, calculated to repel the inference of ignorance and unskillfulness, to show that he was a man of suitable education and acquirements for the safe practice of his profession, must surely be competent and proper. Such evidence must change the whole position of the case before the jury, because if the jury were satisfied he had proper knowledge and skill, the only question must then be whether he had adopted the course of his treatment from mistake, mere error of judgment, or from negligence and want of ordinary care. This, it is obvious, presents a very different state of the question from that where the points of ignorance, negligence, and error are to be considered. As the evidence in question seems to us both pertinent and material, as tending to show ordinary knowledge and skill, we are satisfied it should have been received, and for this cause the case must be sent back for a new trial.

We have examined the declaration, and it seems to us sufficient.

The evidence of the statements of the witness made out of court seem to have been properly rejected.

New trial granted.

PHYSICIAN IS LIABLE FOR INJURIES RESULTING FROM HIS CARELESSNESS, or from a want of ordinary diligence, care, and skill: *Landon v. Humphreys*, 23 Am. Dec. 333; see also *Grannis v. Branden*, 5 Id. 143.

PHYSICIANS AND SURGEONS WHO OFFER THEMSELVES TO PUBLIC AS PRACTITIONERS impliedly promise thereby that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success. This contract also includes an implied promise to exercise reasonable and ordinary care and diligence, and an undertaking on their part that they will use their best skill and judgment in determining the nature of the malady which afflicts the person upon whom they are called to attend, and the mode of treatment best calculated to effect a cure and a restoration to health of the afflicted person: *Patten v. Wiggin*, 51 Me. 594; *Bellinger v. Craigie*, 31 Barb. 534; *Sumner v. Utley*, 7 Conn. 257; *Wood v. Clapp*, 4 Sneed, 65; *Landon v. Humphreys*, 9 Conn. 209; *Long v. Morrison*, 14 Ind. 595; *Ritchey v. West*, 23 Ill. 385; *McNevin v. Lowe*, 40 Id. 209; *Jones*

v. Fay, 4 F. & F. 525; *Perionowsky v. Freeman*, Id. 977; *Howard v. Grover*, 28 Me. 97; *Gallaher v. Thompson*, Wright, 466; *Craig v. Chambers*, 17 Ohio St. 253; *McCandless v. McWha*, 22 Pa. St. 261; *Graham v. Gautier*, 21 Tex. 111; *Wilmot v. Howard*, 39 Vt. 447; *Reynolds v. Graves*, 3 Wis. 416; *Bowman v. Woods*, 1 G. Greene, 441; *Seare v. Prentice*, 8 East, 347; *Slater v. Baker*, 2 Wils. 359; *Hancke v. Hooper*, 7 Car. & P. 81; *Lanphier v. Phipps*, 8 Id. 475; *Piam v. Roper*, 2 F. & F. 783; *Rich v. Pierpont*, 3 Id. 35; *Ruddock v. Lowe*, 4 Id. 519. In judging of the degree of skill or proficiency which a physician or surgeon should exercise, regard is to be had to the advanced state of the profession at the time: *McCandless v. McWha*, 22 Pa. St. 261. The law does not, however, require that those persons should be possessed of the highest degree of professional ability. All that the law requires is the possession of reasonable and ordinary proficiency: *Simonds v. Henry*, 39 Me. 155; *Patten v. Wiggin*, 51 Id. 594; *Alder v. Buckley*, 1 Swan, 69; *McNevens v. Lowe*, 40 Ill. 209; *Howard v. Grover*, 28 Me. 97. A person who does not profess to be a physician, but is called upon for friendly and neighborly advice, which he gives without pecuniary consideration, incurs no professional responsibility or liability: *McNevens v. Lowe*, 40 Ill. 209; *Ritchey v. West*, 23 Id. 385.

PHYSICIAN IS NOT RESPONSIBLE FOR WANT OF SUCCESS OF HIS TREATMENT unless it results from his want of ordinary skill and care, nor does he warrant a cure without a special contract to that effect: *Patten v. Wiggin*, 51 Me. 596; *Graham v. Gautier*, 21 Tex. 111. If the case which a physician is called upon to attend admits of but one course of treatment, his treating it in a different manner would be evidence of a want of skill or ordinary care: *Patten v. Wiggin*, *supra*. No particular school of medical practice is preferred by the law; and when a practitioner is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools: *Bowman v. Woods*, 1 G. Greene, 441; *Patten v. Wiggin*, 51 Me. 597.

EVIDENCE THAT PERSON ACCUSED OF MALPRACTICE IS ORDINARILY PROFICIENT AND SKILLFUL PHYSICIAN and surgeon, while it is admissible, is not conclusive, as his liability depends not so much upon his general proficiency as upon whether he has, in his treatment of that particular case, exercised the requisite degree of skill and care: *West v. Martin*, 31 Mo. 375; *Graham v. Gautier*, 21 Tex. 120. In this latter case the court, in commenting upon a charge, say: "It may be well to remark in reference to another part of the charge of the court, that the fact that a man is a physician of ordinary skill, being proved, does not raise a legal inference, as is supposed by the charge, that the particular services in any one case were skillfully rendered by him. It is a natural presumption, not legal. It is evidence of that fact, and practically it may be the only attainable evidence of it. But there is no rule of law giving it artificial weight as a legal presumption, or making it *prima facie* evidence."

DENTIST OR PHYSICIAN USING CHLOROFORM AS ANÆSTHETIC is only bound to look to natural and probable results, and is not liable for the disastrous result of its administration to a person of peculiar temperament or condition, if such condition was unknown to him: *Boyle v. Winslow*, 5 Phila. 136. The patient must conform to the directions of his physician, if they are such as an ordinarily proficient one would dictate. If he does not do so, either willfully or because of pain, his physician will not be responsible: *McCandless v. McWha*, 22 Pa. St. 261. But where, because of improper treatment by a physician, the patient must inevitably have a crooked arm, the mismanagement and carelessness of those having charge of the patient, whereby his injury is much aggravated, does not destroy his right of action against the

physician. Such mismanagement will only operate to reduce the damages: *Wilmot v. Howard*, 39 Vt. 447. In *Grannis v. Branden*, 5 Day, 260, it was held by the court that particular acts of misconduct and incompetency were admissible in evidence under a declaration against a physician for unskillfully delivering a woman of a child. Upon this ground, his declarations (afterwards proved untrue) that the woman was infected with the venereal disease were admitted in evidence for the purpose of showing the physician's ignorance of the real state of the woman's case.

OPINION OF PHYSICIAN WITH WHOM DEFENDANT STUDIED his profession is not competent evidence of his professional ability, nor is the general opinion of the professors at the institution where his education was acquired: *Leighton v. Sargent*, 31 N. H. 119. So evidence that a surgeon was possessed of professional ability and skill two years after the act complained of is too remote to be safe: *Id.*

WHERE PHYSICIAN FAILED TO DETECT NATURE OF PLAINTIFF'S INJURY for fifteen days, whereby he was occasioned extreme pain, and suffered great expense, he may recover the damages suffered by him, even though he afterwards refuses to submit to a proper remedy. In such a case it is proper to allow the plaintiff to exhibit his injured limb to the jury: *Fowler v. Sergeant*, 1 Grant Cas. 355.

UNDER DECLARATION AGAINST PHYSICIAN FOR UNSKILLFULLY PERFORMING AMPUTATION, evidence that the point of amputation selected was too high up, and that the danger of death was thus increased, is admissible. In such a case, after evidence by the plaintiff showing that the amputation had been performed by the "flap method," and that the unskillfulness consisted in cutting the under flap too short, evidence in rebuttal by the defendant explaining the "circular method of amputation," is inadmissible: *Wright v. Hardy*, 22 Wis. 348.

SANBORN v. GOODHUE

[28 NEW HAMPSHIRE, 48.]

GIFT OF PERSONAL PROPERTY, ACCOMPANIED BY DELIVERY, IS VALID and irrevocable, unless prejudicial to creditors, or the donor was under a legal incapacity or was circumvented by fraud.

TO RENDER GIFT OF PERSONALTY PERFECT, there must be an actual delivery of the property; but where the same is incapable of actual delivery, there must be some act equivalent to it.

WHERE GIFT IS ACCOMPANIED BY DELIVERY, the subsequent execution of a will by the donor will not render the gift void, even though the property may fall within the provisions of the will.

WHERE P. MADE ASSIGNMENT OF PERSONALTY IN TRUST, for the benefit of his minor children, and delivered the same to the trustee, and afterwards made his will, giving his wife one third of his personal property and her dower in his real estate, *held*, that testator's wife had no right to share in the property mentioned in the trust.

EXECUTOR OR ADMINISTRATOR IS NOT BOUND TO ENFORCE COLLECTION OF DOUBTFUL CLAIMS at the expense of the estate without being indemnified for costs.

APPEAL from a decree of the judge of probate of Grafton county. William C. Sanborn and Susan Sanborn, plaintiffs; Converse Goodhue, executor of Asa Paddleford, defendant. Testator bequeathed to his wife one third of his real and personal property, bequeathing the residue to his children, and appointed Converse Goodhue executor. Prior to executing the will he placed in the hands of N. W. Westgate four promissory notes, the principal of which amounted to two thousand eight hundred dollars, and executed a deed of trust, the conditions of which were that the said Westgate should pay over the proceeds of the notes to testator's children upon their arriving at their majority. The executor, never having been requested to collect the notes of Westgate or of the makers, filed an account of his administration, and the plaintiff William C. Sanborn, in the mean time having married testator's widow, appeared and objected to the allowance of the executor's account, for the reason that the notes in Westgate's hands had never been collected. The petition was refused, and the plaintiffs appealed.

D. Blaisdell, for the plaintiffs and appellants.

Kittredge, for the defendant and appellee.

By Court, **EASTMAN, J.** There is no suggestion, either in the case or the argument of counsel, that any fraud was practiced upon Paddleford in disposing of the notes in the manner in which he did; so that the distinct question is presented whether a man can give away his personal property to his children, in anticipation of his death, when such gift will reduce the amount which would otherwise fall to his widow.

It is well settled that a gift of personal property accompanied by delivery is valid and even irrevocable, unless it be prejudicial to creditors, or the donor was under a legal incapacity, or was circumvented by fraud: 2 Kent's Com. 440; *Smith v. Smith*, 7 Car. & P. 401; *Marston v. Marston*, 21 N. H. 491.

Delivery is essential both at law and in equity, but when the article is once delivered, the gift becomes perfect: 2 Kent's Com. 438; *Cook v. Husted*, 12 Johns. 188; *Marston v. Marston*, *supra*.

The delivery must be actual so far as the subject is capable of delivery; and it must be the true and effectual way of obtaining the command and dominion of the property. If the thing is not capable of actual delivery, there must be some act equivalent to it. Not only the possession but the dominion of the prop-

erty must be parted with: 2 Kent's Com. 439; *Noble v. Smith*, 2 Johns. 52 [3 Am. Dec. 399]; *Hawkins v. Blewitt*, 2 Esp. 663.

If the thing given be a chose in action incapable of transfer without an assignment, the law requires that an assignment or some equivalent instrument be made, and the transfer must be actually executed: *Hooper v. Goodwin*, 1 Swans. 486; *Picot v. Sanderson*, 1 Dev. 309; 2 Kent's Com. 439.

According to the authorities, the gift in this case lacked no element of perfectness. The notes were duly assigned by an instrument in writing, stating the object of the trust, and they were indorsed and delivered to the trustee; and it seems to us that in principle it is difficult to distinguish this case from that of *Marston v. Marston*, *supra*, in which it was held that where property in chattels passes by a gift accompanied by delivery, it can not be reclaimed by the subsequent execution of a will by the donor bequeathing the property to another person.

Paddleford had no creditors to interfere with the trust, and there is no complaint from that source. Neither was there any necessity for a consideration; and the natural love and affection of a father for his children would, in ordinary cases, be a sufficient reason for the gift. There is, however, something rather unusual in the course pursued in regard to this property; still, there is nothing disclosed in the case from which we can infer the reason that induced it. Had the assignment not been made, about one thousand dollars of the property put into Mr. Westgate's hands would have gone to the appellants. Perhaps Paddleford thought that his children, being very young, would not be any better provided for, even with the aid of the trust property, than his wife would be with her third of the balance. Perhaps his wife was incapable of transacting business judiciously, and he was apprehensive that the property might be squandered or lost for the want of good management or proper care. Or there may have been other reasons that would induce an affectionate father to take the step he did to provide for his tender and almost helpless offspring.

We are aware that this principle carried out would put it into the power of a husband to deprive his wife of all share of his personal property after his decease; and we are not prepared to say that a husband might not take such a course with his personal property by depriving his wife of all share in it, as would justify a court in holding, upon very slight evidence, that he must have been circumvented by fraud, or been under some aberration of mind. But it will be time enough to pass upon

such a question whenever it shall arise, which, happily for the marriage relation, will very seldom if ever occur. No husband who has received from his wife that treatment which the relations between them deserve, and who witnesses her anxious solicitude and untiring watchfulness, as sickness prostrates his frame and threatens to terminate his existence, will fail to make all that provision for her which his ability shall permit, and which his judgment shall dictate.

In addition to these considerations, which go to the merits of the appellant's claim, there is another difficulty under which they labor in attempting to charge the executor with these notes. The claim for them was certainly very doubtful, according to the adjudged cases in our own state, and it was not the duty of the executor to endeavor to collect them at the expense of the estate without being indemnified for the costs. An executor or administrator is not bound to enforce a doubtful claim merely because some of the heirs, or those interested, may think it well founded: *Griswold v. Chandler*, 5 N. H. 492; *Andrews v. Tucker*, 7 Pick. 250.

We are all of opinion that the executor acted correctly in the premises, and that the decree of the judge of probate must be affirmed.

THE PRINCIPAL CASE WAS CITED AND FOLLOWED in *Craig v. Kittredge*, 46 N. H. 57.

REQUISITE OF GIFT INTER VIVOS.—To constitute a valid gift, there must be an immediate delivery of possession of the thing given to the donee, or what is equivalent to actual delivery: *Noble v. Smith*, 3 Am. Dec. 399. See also the following cases: *Bradley v. Hunt*, 23 Id. 597, and note, where the subject is discussed at length; *Parish v. Stone*, 25 Id. 378; *Hall v. Howard's Adm'r*, 33 Id. 115; *Danley v. Rector*, 50 Id. 242; *Hillebrant v. Brewer and Wife*, 55 Id. 757; *Maulding v. Scott*, 56 Id. 298.

EXECUTOR, LIABILITY OF, FOR NEGLECTING TO BRING SUIT.—An administrator is not liable for neglecting to sue, unless he acted with bad faith, or was guilty of willful default or gross negligence: *Thomas v. White*, 14 Am. Dec. 56. In *Bailey v. Dilworth*, 48 Id. 760, the court held that executors or administrators may compound debts or enter into arbitrations, and their acts will be upheld, if they are fair, beneficial to the estate, and free from fraud, negligence, or misconduct. See also *Williams v. Harrell*, 55 Id. 442.

MAHURIN v. HARDING.

[28 NEW HAMPSHIRE, 128.]

SCIENTER MUST BE PROVED IN ACTION ON CASE FOR DECEIT in sale of personalty.

AM. DEC. VOL. LIX—26

DECLARATION THAT DEFENDANTS, TO INDUCE PLAINTIFF TO EXCHANGE HORSES, falsely and fraudulently affirmed their horse to be sound, when he in fact was unsound, as they well knew, whereby the plaintiff, giving credit to their affirmation, was induced to exchange, and thereby the defendants deceived and defrauded the plaintiff, is case for deceit, and not *assumpsit* on a warranty.

APPEAL from Coos county court. Plaintiff exchanged his one-hundred-dollar bay mare with the defendants, taking in return their dark brown mare, a sucking colt valued at twenty dollars, their joint and several note for thirty dollars, and one other joint and several note for five dollars, the latter being regarded as boot between said mares. The declaration alleged, in addition to the above facts, that the defendants, at the time of the exchange, affirmed that their "mare was then well, good, and sound, with the exception of a slight touch of the heaves." Under such strong inducements and representations, the plaintiff was instantly induced to make the exchange. The mare died shortly afterwards of the glanders, and the plaintiff brought this action to recover, alleging deceit. Under the instructions of the court, who held that defendants were not liable in this form of action, the jury found a verdict for the defendants, and the plaintiff appealed.

Burns and Fletcher, for the plaintiff.

J. W. and G. C. Williams, for the defendants.

By Court, BELL, J. The declaration in this case is in trespass on the case for deceit in a sale. It is said in some of the books that *assumpsit* and case for deceit are in certain cases concurrent remedies for the same injuries in the sale of horses; and to some extent this is true.

Where a seller is chargeable upon an implied warranty of title, or where he makes an express warranty, or makes such statements as to the quality of the article he sells as he intends the purchaser shall rely upon, and which in law constitute a warranty: *Morrill v. Wallace*, 9 N. H. 111; *Whitney v. Sutton*, 10 Wend. 413; *Cook v. Moseley*, 13 Id. 277; while at the same time he knows them to be false, and intends by them to deceive and impose upon the purchaser—the buyer may seek his redress either by action of *assumpsit* upon his warranty, or by action of deceit for the fraud: *Stuart v. Wilkins*, 1 Doug. 21; *Williamson v. Allison*, 2 East, 446; *Wallace v. Jarman*, 2 Stark. 162; *Wardell v. Fosdick*, 13 Johns. 325 [7 Am. Dec. 383]; *Cravins v. Gant*, 4 T. B. Mon. 126; 2 Steph. N. P. 1285.

The warranty is none the less a contract because it is the means by which a fraud is accomplished, and the fraud is in no way diminished because the seller has at the same time bound himself by a warranty.

But these remedies, though concurrent, and though they entitle the sufferer to the same measure of redress in damages, are by no means identical. The distinction between the two classes of actions, as being founded respectively on tort and on contract, is nowhere neglected or disregarded. There are substantial differences at common law, and, as remarked by the learned judge who tried this case in his charge to the jury, the distinction is not merely formal, but in the present state of our law there is a substantial difference, which must not be overlooked. In tort, here, there is a remedy against the person, which ordinarily does not exist in actions on contracts.

The forms of declaring in these cases are substantially different. The declaration in *assumpsit* always states a consideration and a promise or warranty, and complains of a breach of the warranty: 1 Ch. Pl. 99; Saund. Pl. & Ev. 111; *Carley v. Wilkins*, 6 Barb. 557; *Edick v. Crim*, 10 Id. 445. The contract to warrant, of the breach of which the plaintiff complains, and the entire consideration for it, is indispensable to be stated: *Miles v. Shevard*, 8 East, 7; *Webster v. Hodgkins*, 25 N. H. 128.

In this action, the allegations very often introduced, that the defendant intended to defraud, that he knew his warranty to be false, and that he thereby deceived and defrauded the plaintiff, are immaterial, and need not be proved. The defendant is bound to answer for his false warranty, whether he knew it to be false or not; whether he intended a fraud or acted with entire good faith, and fully believed it to be true: *Denison v. Ralphson*, 1 Vent. 366; *Northcote v. Maynard*, 3 Keb. 807; *Anonymous*, Loft. 156; *Gresham v. Postan*, 2 Car. & P. 540; *Bayard v. Malcolm*, 1 Johns. 453; S. C., 2 Id. 550 [3 Am. Dec. 450]; *Case v. Boughton*, 11 Wend. 107; *Carley v. Wilkins*, 6 Barb. 557.

The declaration for deceit alleges that the defendant induced the plaintiff to purchase an article by a warranty or by statements which he knew to be false, and thereby deceived and defrauded him: *Evertson v. Miles*, 6 Johns. 138; *Case v. Boughton*, *supra*; *Carley v. Wilkins*, *supra*; *Edick v. Crim*, *supra*. And this is all that is essential to be alleged: *Barney v. Dewey*, 13 Johns. 224 [7 Am. Dec. 372]; *Weeks v. Burton*, 7 Vt. 67. It is not necessary to make any allegation in relation to the consideration or the terms of the contract of sale, unless they happen to be

connected with the fraud alleged in that case, though if a party incautiously recites the particulars of such a contract, he may be compelled to prove them as he stated them, and may fail if any material variance occurs in his proof: *Weall v. King*, 12 East, 452; *Jones v. Cowley*, 4 Barn. & Cress. 446; *Hands v. Burton*, 9 East, 349; *Morris v. Lithgoe*, 2 Smith, 394; *Blyth v. Bampton*, 3 Bing. 372; *Webster v. Hodgkins*, *supra*; *Hart v. Dixon*, 1 Selw. N. P. 104; *Bender v. Manning*, 2 N. H. 291; *Barney v. Dewey*, *supra*; *Corwin v. Davison*, 9 Cow. 22; *Porter v. Talcott*, 1 Id. 359.

But the intention to defraud, the knowledge that his warranty or his statements were false, and the fact that the plaintiff was thereby defrauded, constitute, in cases of this kind, the very gist and foundation of the action for deceit, and they must be proved or the action must fail: *Sprigwell v. Allen*, Aleyn, 91; *Parkinson v. Lee*, 2 East, 313; *Dowding v. Mortimer*, Id. 450, note; 2 Stark. Ev. 266; 2 Steph. N. P. 1286; *Dale's Case*, Cro. Eliz. 44; *Turner v. Brent*, 12 Mod. 245; 1 Com. Dig., Action for Deceit, A, 8, A, 11, E, 4; *Evertson v. Miles*, *supra*; *Young v. Covell*, 8 Johns. 23 [5 Am. Dec. 316]; *Addington v. Allen*, 11 Wend. 375.

A seller may in good faith make statements as to the qualities of the articles he sells, believing them to be true, and intending that the purchaser should rely upon them, either in the form of explicit warranties, or of such representations as in law constitute warranties, and the purchase may be made in reliance upon their truth; but the seller is guilty of no fraud or deceit, for bad faith and a design to deceive are essential elements of every fraud or deception; and though he may be liable upon his warranty, yet no action founded on fraud or deceit will lie in such case: *Stone v. Denny*, 4 Met. 151; *Salem Rubber Co. v. Adams*, 23 Pick. 256; *Emerson v. Brigham*, 10 Mass. 197 [6 Am. Dec. 109]; *Kingsbury v. Taylor*, 29 Me. 508 [50 Am. Dec. 607]; *Hazard v. Irwin*, 18 Pick. 95; *Shrewsbury v. Blount*, 2 Man. & G. 475; *Freeman v. Baker*, 5 Barn. & Adol. 797; *Page v. Bent*, 2 Met. 371.

It is on this principle that it has in many cases been made a serious question what form of allegation was sufficient distinctly to express this charge: *Chandler v. Lopus*, Cro. Jac. 4; *Medina v. Stoughton*, 1 Salk. 210; S. C., 1 Ld. Raym. 593; *Leakins v. Clissel*, Sid. 146; *Northcote v. Maynard*, 3 Keb. 807; *Cross v. Garnet*, 3 Mod. 261; *Warner v. Tallerd*, 1 Roll. Abr. 91; *Elkins v. Tresham*, 1 Lev. 102; 1 Bac. Abr. 80; *Bayard v.*

Malcolm, 1 Johns. 453; S. C., 2 Id. 550 [3 Am. Dec. 450]; *Lysney v. Selby*, 2 Ld. Raym. 1118; *Harding v. Freeman*, Sty. 310; S. C., 1 Roll. Abr. 91; 1 Com. Dig., Action for Deceit, F, 8, E, 4.

If by the exercise of some ingenuity a declaration could be drawn in such a form that it may seem doubtful whether it is designed to be founded on tort or on contract, and not entirely defective if regarded as either the one or the other, yet it must be held to be founded either in tort or on contract. It can not be considered as having a double aspect or character, or being either the one or the other, as the exigencies of the case may from time to time happen to require. To allow it such a double character would be contrary to the whole theory of the common law, and would make it a perfect anomaly in legal proceedings.

In former times, the more usual form of declaring in actions upon a false warranty was in case for deceit, in which it was more commonly alleged that the defendant *warrantizando vendidit* an article as sound, well knowing that it was not so, though declarations in *assumpsit* were not uncommon: 2 Inst. Cler. 227; *Butterfield v. Burroughs*, 1 Salk. 211; nor declarations in case without *warrantizando vendidit*: *Furnis v. Leicester*, Cro. Jac. 474; *Roswel v. Vaughan*, Id. 196; *Cross v. Garnet*, 3 Mod. 261; *Kenrick v. Burges*, Moore, 126.

In *Williamson v. Allison*, 2 East, 445, in 1802, in a declaration upon a *warrantizando vendidit*, it was expressly held that the declaration was in case for deceit, but that by striking out the averment of the *scienter*, the action might still be maintained in tort, and therefore the *scienter* was not necessary to be proved. It seems to have been decided upon the authority of a *nisi prius* ruling in a case where it did not appear whether the action was on contract (where the ruling would have been right, but no authority for the case in hand) or in tort; and it was conjectured it must have been in tort, because such was then the more common form of declaring.

This decision seems to have been since followed in some cases in England: *Gresham v. Postan*, 2 Car. & P. 540; and is cited in most of the elementary English books on the subject.

It has been followed in Vermont and some of the other states, and has been made the basis of a theory that in actions for deceit in the sale of personal property, if an express warranty is proved, it is not necessary to prove the *scienter*, or any allegation that the false warranty or affirmation was made with any design to deceive. But this idea is not supported by the decia-

ion in *Williamson v. Allison*, *supra*, which is expressly limited to a declaration upon a *warrantizando vendidit*: See *Beeman v. Buck*, 3 Vt. 53 [21 Am. Dec. 571]; *Vail v. Strong*, 10 Id. 457; *West v. Emery*, 17 Id. 583 [44 Am. Dec. 356].

The English case is without authority here, and seems to us entirely unsupported by any authority at common law. And it seems to us entirely inconsistent with the doctrines of the common law to hold that an action for deceit can be sustained without evidence of the intention to deceive. It would be unjustifiable to hold that a man may be imprisoned on execution in an action for a tort, where a court should hold no proof need be produced but of an express contract. In the case of *Crooker v. Willard*, Sullivan, July term, 1851, see 28 N. H. 134, note, it was held that a count alleging a deceit in a sale in the same form as in *Williamson v. Allison*, *supra*, could not be joined with one on contract, so far agreeing with that case. But that decision is entirely irreconcilable with the case of *Vail v. Strong*, *supra*, that such a declaration has a double aspect, which makes it join well with *assumpsit* or trover. And the same view of such a declaration was taken in *Webster v. Hodgkins*, 25 N. H. 128. With those decisions we remain entirely satisfied.

The present case has a declaration framed upon a different principle. It could not be supported as a declaration on a warranty, on any idea of rejecting the allegations importing a charge of fraud, if the cases referred to were not questioned.

It sets forth that the defendants being possessed of a horse which was unsound, and the plaintiff of another of value, the defendants, to induce the plaintiff to exchange with them, did falsely and fraudulently affirm to him that their horse was sound, and the plaintiff, giving credit to their affirmation, was induced to exchange, and did so, whereas the defendants' horse was not sound, etc., which they well knew, and so the defendants, by their false affirmation, have greatly injured and defrauded the plaintiff.

This is a common form of declaring in case for deceit. It has no feature of a declaration in *assumpsit*. It contains no promise nor undertaking, nor consideration for any. It complains of no breach of any contract, or warranty. It does not even speak of any warranty. Its gist and substance is that the defendants, by their false and fraudulent affirmation, have defrauded the plaintiff, and not by any breach of contract. Assuredly no court could hold that such a declaration was proved by any evidence which did not establish the fact of

fraud, of an intention to deceive, carried into effect by statements known to be false.

As, then, the allegation that the defendants well knew their horse to be unsound was essential to be inserted in the declaration, either in direct terms or in expressions of equivalent import, and necessary to be proved, the charge of the court below was entirely correct, and there must be judgment on the verdict.

SCIENTER MUST BE PROVED IN ACTION FOR DECEIT, or one founded on false representations, in order to entitle a party to recover: *Tyron v. Whitmarsh*, 35 Am. Dec. 339; *Loddell v. Baker*, Id. 358.

WHEN ACTION OF DECEIT WILL LIE, AND MEASURE OF DAMAGES IN SUCH ACTIONS: See *Stiles v. White*, 45 Am. Dec. 214, and note, where the prior cases appearing in this series are collected.

CASES
IN THE
SUPREME COURT AND COURT OF
ERRORS AND APPEALS
OF
NEW JERSEY.

BURGESS v. VREELAND.

[4 ZABRISKIE, 71.]

EVIDENCE THAT NOTE WAS PRESENTED FOR PAYMENT and was protested for non-payment is sufficient proof that payment was refused.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONTENTS OF NOTICE OF PROTEST.

EVIDENCE THAT NOTICE OF PROTEST WAS GIVEN without proof of the contents is *prima facie* evidence that the notice was in due form.

NOTICE OF PROTEST NEED NOT STATE IN TERMS that the note was presented for payment, or that the holder looks to the indorser for payment. If these appear by implication, it will be sufficient.

NOTICE OF PROTEST BY MAIL should be mailed in time to go by the mail on the day after dishonor that closes after the commencement of usual business hours in order to bind the indorser.

ACTION tried at Hudson circuit. Caleb A. Burgess, plaintiff; Jacob Vreeland, defendant. Action brought to recover from defendant, as indorser of two promissory notes drawn by George Wood to defendant's order and indorsed by him. Defendant moved at the trial to nonsuit the plaintiff because the latter had not furnished sufficient evidence of the dishonor of the notes, and of notice of non-payment to render the defendant liable. The question was reserved, with leave granted the defendant to move to set aside the verdict and have a nonsuit entered at the bar. The facts appear in the opinion.

Vroom, for the plaintiff.

Scudder and Gilchrist, for the defendant.

By Court, GREEN, C. J. This action was brought against the defendant, as the indorser of two promissory notes for one thousand dollars each, dated at New York, December 19, 1850. Both notes are drawn by George Wood, treasurer, payable to the order of the defendant, and by him indorsed. The one note is payable at seven months, the other at six months, after date. Upon the trial, the fact of the indorsement of the notes by the defendant was duly proved. It was further proved, by evidence taken under a commission, that the note No. 1 on the twenty-second day of July, 1851, the day of its maturity, between the hours of three and five o'clock, was presented by a clerk of the notary at the place of business of the maker, in the city of New York; in the absence of the maker, to a man in charge thereof, and payment demanded, which was refused. Notice of protest was put into the post-office in the city of New York, by the clerk of the attorney, on the twenty third of July, 1851, addressed to the defendant, at his residence at Rocky Hill, Somerset county, New Jersey.

Note No. 2, on the twenty-first of June, 1851, the day of its maturity, between the hours of three and five o'clock in the afternoon, was presented by the notary at the place of business of the maker, in the city of New York, and exhibited to a person in the employ of the maker, and payment demanded. On the twenty-third of June (the twenty-second being Sunday) notice of protest was delivered by the clerk of the notary to the plaintiff; and on the same day, as the witness thinks, between twelve and four o'clock, was mailed to the defendant, at his place of residence. Witness thinks it was mailed before the southern mail closed, but made no inquiry as to the time of day the mail left for Rocky Hill. Note No. 2 answers the description of the note mentioned in the notice of protest. The notice of protest states that a note for one thousand dollars, made by George Wood, treasurer, was protested for non-payment. Upon this evidence being given, the defendant moved for a nonsuit, on the ground that the evidence was not sufficient to sustain an action against the indorser upon either of the notes. The motion was overruled, with leave to the defendant to renew the application to the court at bar upon the coming in of the *postea*.

The application for a nonsuit rests upon an alleged defect of the plaintiff's evidence in several particulars.

1. It is insisted that, in regard to the second note, there is no evidence of a refusal to pay upon presentment and demand of payment.

The evidence shows that on the third day of grace the note was protested by a notary public; that on that day it was duly presented at the place of business of the maker and payment demanded. It is not, indeed, averred in terms by the witness that payment was refused on presentment; but that fact is sufficiently shown, if there be due proof that the note was presented and protested for non-payment, and that due notice of protest was given to the indorser.

2. But it is insisted that there is no evidence that due notice of the dishonor of either note was given to the indorser. As to note No. 1, there was no evidence whatever of the contents of the notice; and as to the second note, though the witness states the contents of the notice, as far as he recollects them, the contents of the notice (as proved) it is insisted are insufficient to hold the indorser accountable.

The evidence of the notary and his clerk in regard to note No. 1 is, that the note was protested for non-payment, and that the notice of protest was put into the post-office, addressed to the defendant at his place of residence. No copy of the notice was exhibited. There was no further proof of its contents. The evidence was taken under a commission in the city of New York, and no cross-interrogatories were exhibited.

It is usual, and certainly advisable, to offer in evidence a copy of the notice of the dishonor of a note, but it is not necessary that the notice should be in writing. It may be verbal; and when a written notice is given, the contents of the notice, as well as the fact of notice, may be proved by parol.

Proof of the fact that notice of dishonor was given is at least *prima facie* evidence that the notice was in proper form. The witness is open to cross-examination. The notice, if written, is in the hands of the defendant, and it is incumbent on him, if he relies on that fact, to show that the form of the notice was defective.

In regard to the second note, the witness on being cross-examined stated that the note declared on, which was exhibited to the witness, answered the description of the note mentioned in the notice of protest. The notice stated that the note was protested for non-payment. It was signed — Bloomfield, the witness being unable to recollect the christian name. It was further shown that William Bloomfield, the notary, had protested the note; that the notice of protest was delivered by his clerk to the plaintiff, and that by a clerk of the plaintiff it was inclosed and mailed to the defendant. It is objected that

the proof does not show that the notice contained the essential requisites that it was duly presented to the maker at its maturity. But it is neither necessary nor usual to state formally that the note has been presented to the maker for payment. The usual form of the notice is simply that the note has been protested for non-payment. That involves the idea that it was presented for payment: *Mills v. United States Bank*, 11 Wheat. 431.

It is further objected that the notice did not state that the holder looked to the indorser for reimbursement and indemnity. The object of the notice is to apprise the indorser that the note is dishonored, and that he is looked to for payment. It is not necessary to state in terms that the holder looks to the indorser for indemnity. It is enough if that fact appears by just and natural implication. The modern cases agree that the fact of giving notice to the indorser that the note is dishonored for non-payment is in itself a sufficient notice that the indorser is looked to for payment: *Lewis v. Gompertz*, 6 Mee. & W. 399; *Cooke v. French*, 10 Ad. & El. 131, note; *Bank of United States v. Carneal*, 2 Pet. 543; Story on Prom. Notes, secs. 353, 354; Story on Bills, secs. 301, 390, note.

It is further objected that the notice was not mailed in time to the indorser. The proof is that note No. 1 was protested on the twenty-second day of July, and the notice put in the post-office in the city of New York the next day; that note No. 2 was protested on the twenty-first of June, 1851, and the next day being Sunday, the notice was put in the post-office on Monday after twelve o'clock, but, as the witness thinks, not after four o'clock P. M. He made no inquiries, nor is there any proof at what hour the mail left for Rocky Hill, the residence of the indorser. The rule is, that when notice of non-payment is sent by mail, it must be mailed or placed in the post-office either on the third day of grace or on the day after, in time to be forwarded by the mail of that day, unless the mail depart at an early hour in the morning before the party, with reasonable diligence, could mail his notice.

It was so held by this court in the *Sussex Bank v. Baldwin*, 2 Harr. (N. J.) 487. The leading cases upon the subject are fully reviewed in the opinion of Mr. Justice Dayton, delivered in that cause. This case falls directly within that authority. There is no proof whatever that either notice was put in the post-office in time for the mail of the day after the dishonor of the note. On the trial, it was thought a proper subject of inquiry at

bar whether the rule requiring notice to be put into the post-office on the day after the protest, in time for the mail of that day, had not undergone some modification since the decision of the case of the *Sussex Bank v. Baldwin*, *supra*, and therefore the motion for a nonsuit was denied. Judge Kent appears to have entertained the opinion that the weight of authority, both in England and in this country, was in favor of a change in the rule. In the earlier editions of his Commentaries, he states the rule thus: "According to the modern doctrine, the notice must be given by the first direct and regular conveyance. This means the first convenient and practicable mail that goes on the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may indeed be sent on Thursday, but must be sent by the mail that goes on Friday:" 3 Kent's Com., 2d ed., 105, 106. This accords strictly with the rule adopted by this court in the *Sussex Bank v. Baldwin*, *supra*, and as laid down by the approved elementary writers: Chit. Bills, 8th ed., 514, 515; Bayl. Bills, 2d Am. ed., 262. And the rule does not appear to have been relaxed by the courts of the state of New York: *Smedes v. Utica Bank*, 20 Johns. 372; *Mead v. Engs*, 5 Cow. 303; *Howard v. Ives*, 1 Hill (N. Y.), 263.

In the more recent edition of Kent's Commentaries, the rule is stated thus: "According to the modern doctrine, the notice must be given by the first direct and regular conveyance. * * * This means the first mail that goes after the day next to the third day of grace; so that if the third day of grace be on Thursday, and the drawer or indorser reside out of town, the notice may indeed be sent on Thursday, but must be put into the post-office or mailed on Friday, so as to be forwarded as soon as possible thereafter:" 3 Kent's Com., 6th ed., 105, 106.

And in note *a* to page 106, the author further states that the rule was laid down too strictly in *Lenox v. Roberts*, 2 Wheat. 373, viz., that notice of dishonor must be put into the post-office early enough to be sent by the mail of the day succeeding the last day of grace; and that the rule, as it is now generally and best understood in England and in the commercial part of the United States, is that notice put into the post-office on the next day after the third day of grace, at any time of the day, so as to be ready for the first mail that goes thereafter, is due notice, though it may not be mailed in season to go by the mail of the day after the default. This is certainly very high authority on a question of commercial law, and the change in the

statement of the principle shows that it was made deliberately and upon examination and reflection. Yet it is worthy of notice that this authority was before this court at the time of the decision in the *Sussex Bank v. Baldwin*, *supra*. It has since undergone the examination of other American courts without securing their concurrence or approbation: *Downs v. The Planters' Bank*, 1 Smed. & M. 261 [40 Am. Dec. 92]; *Wemple v. Dangerfield*, 2 Id. 445. In both these cases the rule was held to be that the notice must be in the post-office in time to go by the mail of the day next after the day of protest, if a mail goes on that day, unless it leaves at an unreasonably early hour.

In *Beckwith v. Smith*, 22 Me. 125 [38 Am. Dec. 290], it was held that the notice must be in the post-office in season to be carried by the mail of the next day after the note is dishonored. In *Chick v. Pillsbury*, 24 Id. 458 [41 Am. Dec. 394], it was held by a majority of the court that it is sufficient if notice of the dishonor of a promissory note be put into the mail within a convenient time after the commencement of business on the day succeeding that of the dishonor.

In that case the note was protested in the city of New York on the twenty-ninth of November, and on the same day notice was given to the agent of the plaintiff; on the next day notice of dishonor, directed to the defendant at his residence in Bangor, Maine, was put into the post-office in the city of New York between twelve o'clock at noon and eight o'clock at night. So far the facts correspond precisely with the facts of the present case. But it was further proved in the case that there was but one daily mail from the city of New York by which letters would go to Bangor; that this mail closed at six, and left the city at seven in the morning, which in the month of November would be soon after daylight. The counsel of the defendant insisted that the notice was not mailed in season; that it must be put into the post-office in season to go by the mail of the next day after dishonor, however early it might depart. And of this opinion was Shepley, J., who, in an elaborate opinion after an able review of the cases, held that the strictest rule, requiring in all cases that the notice should be mailed in season for the mail of the day next after the dishonor of the note, was sustained by the weight of authority. And it is remarkable that Justice Kent, notwithstanding the opinion previously expressed, that the party had the whole of the day following the third day of grace in which to mail notice of protest, concludes the note to which allusion has been made by saying that he apprehends that the

weight of authority is in favor of the view of the rule as taken by Mr. Justice Shepley. But the majority of the court in *Chick v. Pillsbury, supra*, held that the rule does not require that the notice should be mailed in season to go by the mail of the next day, however early it might close, but that it extends to the allowance of a convenient time after the commencement of business hours on the next day to prepare and dispatch the notice; and inasmuch as the notice was mailed in season to go by the next mail which left on the day succeeding that of the dishonor after business hours had commenced, the notice in that case was adjudged sufficient. This principle is precisely in accordance with the ruling of this court in the case of the *Sussex Bank v. Baldwin, supra*. There is, it is believed, no well-considered adjudication that carries the doctrine further.

In *Hawkes v. Salter*, 4 Bing. 715, Best, C. J., is reported to have expressed himself clearly of opinion that notice of protest of a bill dishonored on Saturday, where the mail closed daily at half-past nine in the morning, would be sufficient if put into the post-office in time for the mail of Tuesday. This was, however, but a *dictum*, and affected the rights of no one, as the court held that there was not sufficient evidence that the notice was mailed even on Tuesday morning. In this case half-past nine o'clock may well have been regarded as before business hours, and as an inconveniently early hour to require notice to be mailed. In this view it is in strict accordance with the recent American cases. In the present case, the proof being that the notice was not mailed till after twelve o'clock of the day following the day of the dishonor of the bill, and there being no proof of the hour at which the mail for the residence of the indorser was closed or forwarded, the proof of service of notice is clearly defective. The plaintiff failed to establish his case, and should have been nonsuited on the trial.

The verdict must be set aside, and judgment of nonsuit entered.

THE PRINCIPAL CASE WAS CITED AND FOLLOWED as authority in *Howland v. Adrain*, 30 N. J. L. 41, to the point that "each party has a day for giving notice, that is, the whole day on which he receives notice, to prepare his notice to the party liable to him. He must put it in the office in time to go by the mail of the next day closing after business hours commence, if there be such mail." Judge Elmer, who delivered the opinion, adverted to the manner in which notice was given, and said, in alluding to the principal case: "It seems to be the true principle, that as the notice may be verbal or written, and no particular form is necessary, if it appears to the satisfaction of the court and jury that the party to be charged was, in fact, apprised by

the notice of the dishonor of the note in question, and that he was expected to pay it, the notice will be sufficient, and an omission or misdescription which did not mislead the party notified will be immaterial."

NOTICE TO INDORSEE OR DRAWER, SUFFICIENCY AND EFFECT OF.—Verbal or written notice is sufficient: *Stephenson v. Primrose*, 33 Am. Dec. 281. As to the manner in which notice should be given, see *Ransom v. Mack*, 38 Id. 607; *Glasgow v. Pratte*, 40 Id. 142. Notice should be deposited in the post-office in season for the mail of the following day: *Ransom v. Mack*, *supra*. Notice dated by mistake on the day before the last day of grace is insufficient: *Etting v. Schuylkill Bank*, 44 Id. 205, and cases cited in the notes thereto.

CASES
IN THE
COURT OF CHANCERY AND COURT OF
ERRORS AND APPEALS
OF
NEW JERSEY.

ALLEN v. COLE.

[1 STOCKTON'S CHANCERY, 286.]

WHERE EVERY ALLEGATION OF FRAUD CHARGED IN BILL IS MET AND DENIED by answer, and no effort is made by the party charging the fraud to sustain it, the other party is entitled to the full benefit of the answer so far as the same is responsive to the bill.

ADVERTISEMENT OF SHERIFF'S SALE WHICH SUFFICIENTLY IDENTIFIES PROPERTY TO BE SOLD is in compliance with the law. A sheriff is not bound to describe the number or character of the buildings to be sold by him.

ADJOURNMENT OF SHERIFF'S SALE NEED NOT BE PUBLISHED IN NEWSPAPER. A public proclamation at the place where the sale was to be held, that an adjournment had been made, will suffice.

SHERIFF'S SALE WILL NOT BE SET ASIDE because some of the property disposed of might have sold below its value.

BILL to set aside a sheriff's sale, made by the sheriff of Camden county, and asking that a resale be had. The bill charged that several of the judgments on which the sale was based were fraudulent, and illegality on the part of the sheriff in advertising and conducting the sale.

A. Huff and W. N. Jeffers, for the plaintiff.

T. W. Mulford, for the defendants.

By Court, WILLIAMSON, Chancellor. Every allegation of fraud charged in the bill is met and denied by the answer. The complainant has made no effort, by proof, to sustain the fraud, and

of course the defendants are entitled to the full benefit of their answer, so far as it is responsive to the bill.

As to the manner in which the sale was conducted by the sheriff, his answer is perfectly satisfactory; and shows that the suspicions entertained by the complainant as to any improper influence exerted over the sheriff, either by Mr. Cole or by Mr. Mulford, are without any foundation whatever.

The advertisement of the sheriff was in strict compliance with the law. It sufficiently identified the property. The sheriff was not bound to describe the number of buildings or their character. To compel a sheriff to do this would be oppressive, and oblige him to incur an expense for which the law provides him no remuneration.

The adjournment of the sale was not advertised in the newspaper. Public proclamation was made of the adjournment, at the time at which the sale was published to take place. It has been before decided in this court, *Cox v. Halsted*, 1 Green Ch. 316, that this is all the law requires.

It may be true that some of the property sold below its value. Such a consequence might reasonably be expected to follow from the sale of property situated as this was, with incumbrances upon it to a large amount, and defects of title as to some of it in a course of litigation.

The time of filing his bill does not entitle the complainant to the very favorable consideration of the court. If he had any foundation for many of the allegations of his bill, he should have asked the interposition of the court, prior to the sheriff's making the sale. But he waits to see the result of the sale. He allows the property to be sold on his own judgment, as well as that of other judgment creditors, and when it turns out that purchasers have not been so unfortunate as to make bad speculations, but rather have been lucky, at the expense of the judgment creditors, the creditor then complains of the unfavorable circumstances under which the sale was made, and of frauds committed which demanded his prompt action to entitle him to be relieved from their consequences.

But, as I said, the frauds are denied, and no attempt is made to sustain them.

The property was sold under fifteen judgments, amounting to upwards of seventeen thousand dollars. The complainant is the only creditor who complains of the sale. I have no good reason for supposing from the evidence before me that the property would sell any better if a resale was ordered, or that

either the complainant, or any other creditor, would derive any benefit from it.

The bill must be dismissed with costs.

TIME, PLACE, AND ADJOURNMENT OF SHERIFF'S SALE.—This subject is fully treated in prior cases appearing in this series, together with the notes to the same: *McDonald v. Neilson*, 14 Am. Dec. 431; *Russell v. Richards*, 26 Id. 532; *Governor v. Van Meter*, 33 Id. 221; *Maddox v. Sullivan*, 44 Id. 234; *Howard v. North*, 51 Id. 769.

SHERIFF'S SALE, ADVERTISING, AND WHAT NOTICE SHOULD CONTAIN: See *Maddox v. Sullivan*, 44 Am. Dec. 234, and cases cited in the note 238; Freeman on Void Judicial Sales, sec. 18.

THE PRINCIPAL CASE WAS DISTINGUISHED in *Hodgson v. Farrell*, 2 Mo. Cart. 88.

REDMOND v. DICKERSON.

[1 STOCKTON'S CHANCERY, 507.]

DIRECTORS OF INCORPORATED COMPANY CAN NOT SPECULATE WITH FUNDS or credit of the company, and appropriate to themselves the profit of such speculation; nor can they, in making sales or purchases for the company, take advantage of their position as directors, either directly or indirectly, and a director who does so can not come into a court of equity for relief.

WHEN ALLEGATION IN BILL CLAIMED THAT CHECK WAS PAID, and then detailed the manner and circumstances of its payment, and the latter do not show facts constituting a valid payment, a demurrer to the bill should be sustained.

EQUITY WILL NOT AFFORD RELIEF TO PARTY when he has adequate relief at law.

APPEAL from the court of chancery. The facts are stated in the opinion.

William L. Dayton, for the appellant.

Asa Whitehead, for the appellee.

By Court, HAINES, J. The appellant filed his bill of complaint in the court of chancery, alleging that the Boudinot Manufacturing Company, which was chartered on the twelfth of February, 1835, with a capital not to exceed two hundred thousand dollars, divided into shares of one hundred dollars each, was organized upon a capital of thirty thousand dollars, subscribed and paid for three hundred shares of the stock. That the company after some years suspended operations for want of funds, and that the complainant, with Philemon Dickerson, Samuel G. Wheeler, and John C. Benson, in the year 1843, agreed

to become partners in the purchase of the capital stock of the company, with the intention of putting the same into operation. That the complainant accordingly purchased one hundred and twenty-six shares, Philemon Dickerson ninety-one shares, and Wheeler and Benson each five shares, and held them in trust each for the other. The remaining seventy-three shares were held by Stoutenburgh and Laffan, who refused to sell them. Mr. Dickerson transferred one share to John M. Gould for the purpose of making him eligible as a director.

A meeting of the stockholders was then called, and the complainant, with Messrs. Dickerson, Wheeler, Benson, and Gould, elected directors.

The affairs of the company being embarrassed, and large sums of money being required to pay the debts and to put the machinery in condition for operation to advantage, the complainant and his associates agreed to advance a sum of money sufficient for the purpose, if Stoutenburgh and Laffan would pay their proportion towards it; but they refused to advance any more money, or to sell their stock for any reasonable sum.

The associates, for the purpose of relieving themselves of this embarrassment, applied to the legislature and procured the passage of a supplement to the charter of the company. By this supplement they were authorized to increase the capital stock to three hundred thousand dollars, to be divided into shares of one hundred and fifty dollars each; and to demand from the stockholders an additional sum of fifty dollars on each share already subscribed for, by installments of ten dollars per share, on thirty days' notice. The penalty for neglect of payment was the forfeiture of the stock.

The directors, having by a formal resolution accepted the supplement, resolved to call in an installment of ten dollars on each share, payable on or before the first day of June then next, and gave the notice required.

Stoutenburgh and Laffan neglected to pay the installment, and the directors on the sixth day of June declared their seventy-three shares to be forfeited to the company.

At the same time, the complainant, on payment of the installment due upon the shares standing in his name, gave his check on the bank of New York for one thousand two hundred and sixty dollars, payable to the order of Philemon Dickerson, president of the Boudinot Manufacturing Company; and each of the other associates gave some check or memorandum in writing for the installments due upon the shares held by them re-

spectively. These checks, the complainant alleges, were given as their memoranda, to remain until they could transfer to the company certain machinery which they had purchased of one Hamilton Gay for sixteen thousand eight hundred dollars.

The company, then, in pursuance of the original understanding of the parties, agreed to purchase of the associates that machinery for twenty-six thousand eight hundred dollars, being an advance of ten thousand dollars upon their purchase of Mr. Gay. In payment of this machinery, the company gave a mortgage upon it for twelve thousand dollars, and issued to the associates one hundred and fifty-two shares of the capital stock, which at its par value of one hundred and ten dollars amounted to the balance due them within the sum of eighty dollars.

The complainant, after this, purchased the interest of Wheeler, and in September, 1845, Wood and Merritt purchased of the complainant all his interest in the company, after a balance-sheet had been furnished to them exhibiting the affairs of the corporation, but in which no mention was made of the check. It is alleged that it was understood by the directors that the check and memoranda given for the installments were paid off in the negotiation of the machinery, and were filed away among the canceled papers.

Wood and Merritt, having become the owners of all the stock and effects of the company, brought an action at law upon the check in the name of Philemon Dickerson, president of the Boudinot Manufacturing Company. After the commencement of that suit, certain creditors of the company procured an injunction restraining them from the exercise of their corporate powers, and the appointment of receivers, who are prosecuting the action.

The bill in this cause was filed to stay the proceedings at law, and for specific and general relief. An injunction was issued, and Messrs. Dickerson and Benson have filed their several answers. A general demurrer to the bill was filed on behalf of the receivers. The chancellor, after argument, sustained the demurrer and dismissed the bill.

From this decree the complainant appeals to this court, and the question is, whether the demurrer was properly sustained.

The *gravamen* of the bill is that the complainant is sued at law against equity and good conscience. To maintain this position, it is insisted—1. That the check was given as a mere memorandum, to remain until the machinery should be trans-

ferred to the company, and that it was agreed by the company that it should be canceled upon such transfer being made.

The directors, in this matter, were proceeding under the authority of the supplement to their charter. That act authorized them to demand from the stockholders the additional sum of fifty dollars on each share of the capital stock already subscribed, not exceeding ten dollars on each share at any one time; and by way of penalty for neglect to pay after the proper notice, they might declare the stock forfeited.

This was fully understood by the directors, and promptly acted upon by them in their resolutions of the sixth of June, declaring the seventy-three shares of Stoutenburgh and Laffan to be forfeited to the company for default of payment. And upon their own construction, it must be held that the check and other memoranda given by the directors individually were taken as cash, and intended to be *bona fide* payments of the amounts mentioned in them; otherwise their own stock became liable to forfeiture, and it is not to be supposed that they would impose upon others the penalty which they had themselves incurred.

If they were not intended as payments, the directors would be obnoxious to the charge of having procured the supplement and called in the installment, for the mere purpose of wresting from the hands of Stoutenburgh and Laffan, by the forms of law, the shares of stock which they had failed to get by fair negotiation. The object of increasing the value of the shares was to raise funds to pay the debts and put the works in operation; and if the directors paid nothing upon their shares, they might be suspected of the design of raising funds out of their fellow-corporators without making any advances themselves.

If these checks were not taken as payments, and to be collected and converted into money, then the directors must have ventured upon an expedient to raise funds to increase the nominal value of the stock, and to create a fictitious credit, which is but too common with the managers of corporations, but which a court of justice can neither uphold nor approve. Such transactions may be sanctioned by the code of those whose motto is, *Rem, facias rem, recte si possis; si non, quocunque modo rem*, but they can not stand the test of law or equity. They who engage in them, whether tempted by the love of gain or seduced by the force of example, must act upon their own responsibility and at their own risk, and look to the end to justify the means. The aid or sanction of the courts they will seek in vain.

The suspicion, even, of this, we can not entertain towards these directors. Their character should be a guaranty of the honesty of their intentions, and the alternative is, that the check was taken as a payment, to be converted into money for the purposes mentioned in the bill.

2. It is urged that the action at law is against equity, because the check was considered to have been paid and was meant to be canceled.

The allegation of payment is accompanied by a statement of the manner in which it was done, to wit, that the machinery purchased of Mr. Gay was conveyed to the company at an advance of ten thousand dollars; and that in the estimates, and by the understanding of the directors, the whole stock was paid by this and other machinery.

It is unnecessary for the purpose of this suit to inquire into the validity of this sale by the associates as individuals to themselves as directors, at such an advance, or of its influence upon their creditors and the public. It is sufficient that it appears by the bill that the company directed the issue to the associates of one hundred and fifty-two shares of the capital stock, of the par value of sixteen thousand seven hundred and twenty dollars, expressly to pay for the machinery, and that by it they did pay to within eighty dollars of the sum of sixteen thousand eight hundred dollars, paid by the associates from their own funds to Mr. Gay. The machinery, therefore, can not be considered as a payment of the check and memoranda given for the installment.

Upon the merits of the case as made by the complainant the bill was properly dismissed.

There is another reason why the demurrer was well sustained. The bill does not present a case in which the aid of a court of equity is required. It does not seek a discovery to enable the complainant to make out his defense. There is no allegation in it that is not proper to be proved at law. The whole transaction is within the knowledge of some or all of the associates, and they are competent witnesses. The books and papers can be procured on notice or by process, or their contents be proved. The prayer that the check be given up to be canceled is that which every defendant at law might make, and if with success, he would find an easy way of changing the forum of every action. The contribution prayed for is a matter entirely between the associates, and can not be considered in a suit between the owner of the check and the complainant. If the facts pre-

sented by the bill afford a defense, the complainant has adequate relief at law, and a court of equity should not take jurisdiction of the case.

Let the decree be affirmed, with costs.

Decree affirmed unanimously.

LIABILITY OF DIRECTOR TO ACCOUNT FOR SECRET PROFITS. — It is a familiar doctrine of the courts of equity that a trustee will not be permitted, without the knowledge and consent of his principal, to speculate out of his trust or to retain any gain which may have accrued personally to him therefrom, but that he must account to his *cestui que trust* for all profits which he may make out of the trust relation. This rule will apply with full force to directors of corporations: Seymour on Liability of Officers and Agents of Corporations, 360, citing the principal case; Perry on Trusts, sec. 427. In *Stratton v. Allen*, 16 N. J. Eq. 229, the court held that a director of a corporation might make contracts with it like any other individual, and when the contract is made, the director stands, as to the contract, in the relation of a stranger to the corporation. In *Stewart v. Lehigh Valley R. R. Co.*, 38 N. J. L. 505, the court held that an express contract between the director of a corporation and his company is not void, but is voidable at the option of the *cestuis que trust* exercised within a reasonable time. No consideration of its apparent or intrinsic fairness will induce a court either of law or equity to enforce it against the resisting *cestuis que trust*. See also the following cases in this series: *Graff v. Castleman*, 16 Am. Dec. 741; *Myers v. Myers*, Id. 648; *Richardson v. Jones*, 22 Id. 293; *Saltmarsh v. Beene*, 30 Id. 525; *Miller v. Davidson*, 44 Id. 715; *Hodges v. New England Screw Co.*, 53 Id. 624, and the extensive note to the same, where the subject has been treated at length.

BLACK v. WHITALL.

[1 STOCKTON'S CHANCERY, 572.]

EQUITY WILL AFFORD RELIEF AGAINST PALPABLE MISTAKE appearing upon the face of an executor's account after final settlement and allowance.

ADVANCEMENT MADE DURING LIFE OF TESTATOR is no part of the estate to be administered on by the executor.

WHERE WILL DIRECTED THAT ADVANCEMENT should be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the sum advanced should be deducted from the share of the child advanced, it was held that it was an intention to designate the mode of distribution in order to secure perfect equality among the legatees.

NOTES OF INSOLVENT NON-RESIDENT DEBTOR OF ESTATE may be omitted from the inventory and administrator's account without prejudice to the administrator.

BEQUEST TO MARRIED WOMAN WILL NOT BE DEFEATED BY REASON OF LACHES of the husband in prosecuting her claim to the same.

ADVANCEMENT AS SUCH NEVER DRAWS INTEREST.

EXECUTOR WILL NOT BE PERMITTED TO SET OFF DEBTS due from an insolvent husband in a bill brought by husband and wife to secure a legacy due the wife.

APPEAL from the court of chancery. The facts are stated in the opinion.

Ten Eyck and W. L. Dayton, for the plaintiff.

Spencer, J. L. N. Stratton, and P. D. Vroom, for the defendants.

By Court, GREEN, C. J. The first point relied upon for reversing the decree of the chancellor in this case is, that the decree of the orphans' court, confirming the accounts of the executors of Rachael Newbold, is final and conclusive, and can not be set aside or opened in equity except for fraud. The legal principle insisted on is, that in the absence of fraud, a palpable mistake appearing upon the face of an executor's account, after final settlement and allowance, can not be relieved against in equity, but can only be corrected by application to the orphans' court for resettlement. The objection is based upon the provisions of the twenty-seventh section of the act respecting the orphans' court, R. S. 214, by which it is enacted that the sentence or decree of the orphans' court on the final settlement and allowance of the accounts of executors shall be conclusive upon all parties, and shall exonerate and forever discharge every such executor from all demands of creditors, legatees, or others, beyond the amount of such settlement, except for assets or moneys which may come to hand after settlement as aforesaid; excepting also in cases where a party applying for a resettlement shall prove some fraud or mistake therein to the satisfaction of the said orphans' court. The design of the action is clearly to declare the conclusiveness of the settlement of accounts by the orphans' court, and to prescribe the particular cases in which alone that court may open the account and order a resettlement. It was not designed to limit the powers or abridge the jurisdiction of the court of chancery. If this be otherwise, it clearly takes from the court of equity the power to interfere in cases of fraud, as well as in cases of mistake. Prior to this enactment the court of equity had a clear right to correct mistakes in the accounts of executors after final settlement. A settlement and quietus in the orphans' court were not conclusive as to the correctness of the accounts, but they were liable to be inquired into even at law.

In *Livingston v. Combs*, Coxe, 42, and in *Turvies' Case*, 2 Roll. Abr. 678, it is said that at law, upon *plene administrabit* pleaded, the account given to the ordinary shall not be given in evidence, nor any regard had to it.

In *Bissell v. Artell*, 2 Vern. 47, an account of an intestate's estate was decreed to be taken in equity, notwithstanding an account was previously taken, and a distribution decreed in the spiritual court.

The later authorities, however, regard the settlement of an account in the ecclesiastical court upon notice to all parties in interest as final: *Penvill v. Luscombe*, 2 Jac. & W. 201; Toller on Executors, 492; 2 Williams on Executors, 1776. But the force of the objection consists in the fact that the statute creating orphans' courts creates them courts of record, and declares that their decrees shall be final; thus placing their judgments, it is insisted, on the same ground with the judgment of any other court of record, and precluding a court of equity from correcting such judgments for any mistake. It is true, a court of equity does not formally correct mistakes in judgments at law, but it has the undoubted power, and it anciently formed a very extensive branch of equity jurisdiction, to relieve not only against fraud, but against surprise, injustice, or mistakes suffered or committed in a court of law, by compelling the party to submit to a new trial, or by granting a perpetual injunction against his execution: Graham on New Trials, 557; *Schermerhorn v. Schermerhorn*, 6 Johns. Ch. 70.

A court of equity, moreover, had, at the time of the passage of the act in question, and still has, concurrent jurisdiction with the orphans' court in the settlement of executors' accounts: *Salter v. Williamson*, 1 Green Ch. 480. In correcting an obvious mistake upon the face of the account as settled, a court of equity does not attempt to review the judgment of the orphans' court. The matter in question is not *res adjudicata*. It never was passed upon by the orphans' court. It is believed, moreover, to be not only in accordance with the sentiment of the profession, but with the practice of the court of equity to correct, even incidentally, the mistakes of a settlement in the orphans' court. Such was obviously the opinion of Chancellor Vroom in *Gray v. Fox*, Sax. 259 [22 Am. Dec. 508]; in *Peacock v. Newbold*, 3 Green Ch. 61, which was a bill for the recovery of a residuary legacy; the bill contained no allegation of any mistake in the settlement before the orphans' court. But upon the production of the account the mistake was apparent, and it was conceded, as an unquestioned point, that the error could be corrected in law, and if the complainant was entitled to recover at all, she should recover the full amount of her share without the necessity of resorting to the orphans' court to have the mistake

corrected in that tribunal. The practical importance of this question, and the earnestness with which it was pressed upon the attention of the court, rather than its influence upon the result of the present case, render the expression of the views of the court in regard to it proper.

But does the decree of the chancellor, in point of fact, set aside or open the decree of the orphans' court? The complainants' bill does indeed charge that the sum of three thousand dollars, advanced to Lydia Whitall, was unlawfully and fraudulently omitted both in the inventory and in the account. But it is apprehended that it was omitted from both with perfect propriety; and to have inserted it in either would have led to serious embarrassment. The inventory required to be exhibited by the executor is an inventory of the goods, chattels, and credits of the deceased. An advancement is neither; it forms no part of the estate; it can not be resorted to for the payment of debts. The child advanced can not be compelled to refund for any purpose connected with the settlement of the estate. To require the executors to include the advancement in the inventory would not only be in contravention of the statute, but would render them liable for moneys to which they had no title, and for which they were in no sense liable. So the executor is required to account, and does account, for so much of the goods, chattels, and credits of the deceased as came to his hands to be administered, and for his payments and disbursements out of the same. But an advancement made in the life-time of the testator is no part of the estate to be administered by his executor. As has been already said, it can upon no contingency be recovered back from the person advanced, even for the purpose of equalizing legacies. The accounting executor and the surrogate, therefore, rightly held that the sum of three thousand dollars advanced by Rachael Newbold, the testatrix, in her life-time, to her daughter constituted no proper part either of the inventory of the estate or of the final account of the executor. It constituted no part of the estate. It never came to the hands of the executors to be administered. They never could have been held liable for it, as they are for the balance of the estate, to legatees or next of kin. The will does, indeed, declare that the advancement shall be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the three thousand dollars advanced shall be deducted from the share of the child advanced; but the whole design and operation of the clause is to

designate the mode in which the distribution shall be made, in order to insure perfect equality among the legatees. It does not change the nature of the advancement.

So in regard to the two notes claimed by the estate against the husband of Lydia Whitall: they were omitted, both in the inventory and in the account, with perfect propriety. The debtor was non-resident and insolvent. The notes never could have been recovered from him. They were desperate debts. If included in the inventory, the executor must, in his final account, either have prayed an allowance for them as desperate debts, which would have left the balance of the accounts precisely as it now is, besides adding additional embarrassment to the matter in controversy; or he must have charged himself with the amount as a part of the balance in his hands, and thereby, in several possible contingencies, have rendered himself personally liable for money which he never received, and for which he was bound neither in law nor in equity to account. Under the peculiar circumstances of the case, the executor, in omitting the claims against Samuel Whitall from the inventory and from the account, took a perfectly justifiable course, and the only one which in prudence he could have taken. There was neither fraud nor mistake in the omission, and no inference unfavorable to the executor should be drawn from it.

There is, then, neither fraud nor mistake in the account of the executor as settled and allowed by the orphans' court. It presents truly the balance of the estate of the testatrix which came to the hands of the executors to be administered. The sum in their hands to be distributed is thirteen thousand three hundred and eight dollars and seventy-four cents—the balance apparent upon the face of the account. The only question is, how that sum is to be distributed among the legatees in pursuance of the directions of the will. It was justly observed by the chancellor that “it is not necessary to open the accounts or to interfere with any action of the orphans' court in order to ascertain the complainants' rights, or to give them the relief they seek.” In point of fact, the decree of the court of chancery has in no wise altered or interfered with the account as settled and allowed by the orphans' court.

The second point relied upon for reversal is that the account has been acquiesced in for so long a period before bill filed that equity will not interfere.

As has been already said, the decree of the chancellor in no wise disturbs the account as settled by the executor. That ac-

count, in connection with the directions of the will in regard to the advancement and the mode of distribution, exhibits a larger sum due to the complainant than is allowed by the chancellor's decree. The final account was settled in August, 1836, exhibiting on its face a balance due to the complainants. The bill in this cause was filed in December, 1846, something more than ten years afterwards. The legatee during all that period has been a married woman. Upon the death of her husband, the claim would survive to her. The statute of limitations could not be pleaded against her either at law or in equity. The only view in which the delay can avail the defense is either—1. Upon the ground that the delay has been such as to raise a presumption of payment (which is not pretended); or 2. That greater injustice will arise to the defendant from the complainant's laches and delay in enforcing her claim than would result to the complainant from a denial of her rights.

The case affords no ground whatever for arriving at such conclusion. I know of no case where the laches of the husband to enforce the claim of a married woman for a legacy bequeathed to her has been held available in equity to defeat the claim of the wife except upon the ground of presumption of payment. In *Peacock v. Newbold*, 3 Green Ch. 71, the bill was filed to recover a legacy to a married woman, thirty-one years after the death of the testator, twenty-four years after the settlement of the estate, and seventeen years after the death of the executor, and no cause shown for the delay. The bill was dismissed by the chancellor, on the ground of the presumption of payment, arising from the time which elapsed before suit brought. That decree was unanimously affirmed by this court upon appeal. Neither the lapse of time nor the attendant circumstances create any analogy between the two cases.

The third and last point relied on for reversal is that nothing is due to the complainants.

In stating the accounts between the parties, it is clear—

1. That no interest on the advancement of three thousand dollars should be charged against the legatee. An advancement as such never draws interest. There is nothing in the will that indicates an intention on the part of the testatrix that it should draw interest, but the reverse. The apparent inequality created by the length of time which the advancement is held and enjoyed before the other legatees receive their share constitutes no ground for charging the advanced legatee with interest. It is an inequality which always exists where advance-

ments are made at different times by a parent among a family of children.

2. The bill due from Samuel Whitall to the testatrix, March 25, 1816, for five hundred and thirty-nine dollars and thirty cents should not be allowed by way of set-off. It had been due more than six years at the time of the advancement to the daughter. The husband was then insolvent. If the testatrix had intended that it should be paid, it would either have been settled at the time of the advancement, or have been specially directed by the will to be deducted from the wife's share.

There is no error in the decree prejudicial to the rights of the appellant.

It is insisted that there is error in the decree prejudicial to the respondents, in this, that it allows the executor to set off a debt due to the estate of the testatrix from the husband against the wife's claim for her legacy. It would perhaps be a sufficient answer to this exception that no appeal has been taken from this portion of the decree. But waiving this formal answer, and admitting the question to be fairly open for consideration, there is no error in this particular in the decree.

It can not be maintained as a general proposition that in a bill by a husband and wife for the wife's legacy, the executors will be permitted to set off debts due from an insolvent husband to the estate. The principles upon which equity acts in aiding the husband to recover the wife's legacy are inconsistent with the allowance of the set-off to the prejudice of the equity of the wife.

Following the principles of the civil law, equity in suits to recover the wife's property regards the interests of the husband and wife as totally distinct. It does not treat the property of the wife, where the husband is seeking to reduce it into possession, as the property of the husband. It will not, as a general rule, aid the husband, except upon his making suitable provision for his wife. The principle is laid down in the broadest terms, that equity will not interfere to put the husband in possession of the wife's property without his making suitable provision for her, unless she voluntarily, on examination, waive any provision. And the practice has been adopted in cases like the present, where the bill is filed in the name of the husband and wife, and no objection made on the part of the wife to the husband's recovering the legacy: *Brown v. Elton*, 3 P. Wms. 202; *Glen v. Fisher*, 6 Johns. Ch. 33, 36 [10 Am. Dec. 810]; 2 Kent's Com. 140.

So long as the court has the direction or control of the fund out of which the equity of the wife is to be secured, her claim can not be defeated by any management of the husband: *Clancey on Husband and Wife*, 509.

But in the present case the allowance was made to the executors as a matter of equity resulting from the provisions of the will. The chancellor regarded the debts of the husband as a part of the fund out of which the legacy to the wife was to be paid, and on that ground it was deemed, under the circumstances of the case, inequitable that the husband should reduce the legacy into possession without allowing, by way of set-off, this debt due from him to the estate. As no claim was set up on behalf of the wife in the court below, of any equity in the legacy, this court could not on that ground reverse the decree.

I am of opinion that the decree of the chancellor should be in all things affirmed, with costs.

Decree accordingly.

The decree of the chancellor was affirmed by the following vote: For affirmance, GREEN, C. J., OGDEN, ELMER, POTTS, HAINES, Justices; HUYLER, VALENTINE, CORNELISON, RISLEY, JJ.; for reversal, WILLS, J.

WHEN EQUITY WILL AFFORD RELIEF IN SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS: See *Salter v. Williamson*, 35 Am. Dec. 513, and cases cited in the note.

ADVANCEMENTS, WHAT ARE—VALIDITY AND EFFECT OF: See *Yundt's Appeal*, 53 Am. Dec. 496, and note citing prior cases.

INTEREST IS NOT GENERALLY CHARGEABLE ON ADVANCEMENTS: *Yundt's Appeal*, 53 Am. Dec. 496.

SET-OFF IN EQUITY, GENERAL RULE REGARDING.—The doctrine of set-off asserted in the principal case is an excellent illustration of the rule in New Jersey, as will be seen from the following instances furnished in decisions rendered since. The general rule in equity, as well as at law, is that joint and separate debts, or debts accruing in different rights, can not be set off against each other: *Brewer v. Norcross*, 17 N. J. Eq. 219. The right to set off is a mere legal right, a matter of practice in courts of law, and has no claim to the protection of a court of equity: *Dungan v. Miller*, 19 Id. 218. To maintain an equitable set-off, the party seeking the benefit of it must show some equitable ground for being protected against his adversary's demand. The mere existence of a counter-demand is not enough: *Hewitt v. Kuhl*, 25 Id. 24. Set-off necessarily flows from a contract: *Price v. Lewis*, 55 Am. Dec. 536. The subject will be found to have been further treated in *Blake v. Langdon*, 47 Id. 701, and cases cited in the note, which are published in this series.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

BAKER v. HOAG.

[7 NEW YORK (3 SELDEN), 535.]

CARGO OF SUNKEN OR ABANDONED VESSEL IS NOT "WRECKED PROPERTY," and the provisions of 1 N. Y. R. S. 690, sec. 1, regulating keeping of wrecked property for its owner, do not apply to it.

SUNKEN VESSEL OR CARGO IS SUBJECT OF SALVAGE, and the salvor has a lien upon it for compensation, provided the place where the rescue of it is effected is within admiralty and maritime jurisdiction.

ADMIRALTY AND MARITIME JURISDICTION COMPREHENDS NAVIGABLE RIVERS as high up as the tide ebbs and flows, although it should be within the body of a county.

LIEN GIVEN BY MARITIME LAW, FOR SALVAGE, MAY BE RECOGNIZED and protected by a common-law court, in replevin by the owner of the res against the salvor, without proof of a request or promise to pay.

APPEAL from a judgment in favor of defendant in replevin. The action was for wool belonging to plaintiff, which was aboard a canal-boat that was sunk by a collision in the Hudson river (below the limit reached by the tide). Defendant found and raised the boat, saving the wool for its owner; but refused to deliver it without payment of compensation. Ten requests for instructions were preferred by his counsel, the chief of which were that defendant had a lien on the wool—1. At common law; 2. Under 1 N. Y. R. S. 690, sec. 1 (quoted in the opinion); and 3. By virtue of a letter written by plaintiff to defendant, after being informed of the salvage, asking to have the wool carried to H., and promising to "pay the expense." The judge declined to recognize any lien at common law or under the statute; and as to the promise, limited the jury to allowing a lien for

such services and expenditures as were rendered by the defendant upon and in pursuance of some request or promise to pay, made either to him individually or to the public.

Henry Hogeboom, for the appellant.

K. Miller, for the respondent.

By Court, JEWETT, J. If the plaintiff had a lien on the wool at the time the defendant took it from his possession, it was a sufficient special property to entitle him to maintain this action: *Ingersoll v. Van Bokkelin*, 7 Cow. 670; *Wheeler v. McFarland*, 10 Wend. 318; *Rogers v. Arnold*, 12 Id. 30.

At the trial, the plaintiff insisted that he at that time had a lien on the wool in question: either—1. For salvage by the common law; 2. For salvage by the provisions of our statute concerning wrecks; or 3. By agreement, or in consequence of the offer of a reward by the defendant for finding and saving the wool, or in consequence of a promise by the defendant to pay for finding, or that at least there was evidence on which the plaintiff could rely to establish a lien by agreement. The circuit judge charged the jury that the plaintiff had no lien, either at common law or under the statute, for salvage, or for his services, independent of any express agreement between the parties for a lien, or any growing out of the offer of a reward made by the defendant to the public generally for securing and restoring his wool.

I think that the learned judge was right in saying that the plaintiff had no lien on the wool for his services, under the provisions of our statute concerning wrecks, for the plain reason that the wool was not a wreck: a wreck is defined to be such goods as after a shipwreck are cast upon land by the sea, and left there, within some county; for they are not wrecks so long as they remain at sea in the jurisdiction of admiralty: 2 Inst. 167; Angell on Tide-waters, 289; *Constable's Case*, 5 Co. 106 b; 1 Bla. Com. 291. The property in question was not cast upon land by the sea.

By the common law all wrecks belonged to the crown, and the property in them was lost to the owner. But our statute declares that "no ship, vessel, or boat, nor any goods, wares, and merchandise, that shall be cast by the sea upon the land shall be deemed to belong to the people of this state, as wrecked property, but may be recovered by the owner, etc., upon the payment of a reasonable salvage and necessary expenses:" 1 R. S. 690, sec. 1. The statute makes provisions for the im-

mediate sale of wrecked property if it shall be in a perishable state, and if not, for its safe keeping for the space of a year for the true owner, to whom it is to be delivered on his paying reasonable salvage; and if not reclaimed within that time, the property is required to be sold and the proceeds accounted for to the state.

All the provisions of this statute, I think, relate exclusively to such property as at common law is known as wrecks, and the charges upon such property as salvage and the expenses incurred under the provisions of the statute. It was well remarked by the court below that what was wrecked property at common law is wrecked property under the statute; in relation to which it was the intention of the legislature to make provisions, and nothing beyond.

But I think that the judge erred in charging the jury that the plaintiff had no lien on the wool for salvage at the common law. The facts on which this question arises are not in dispute. The canal-boat upon which the wool in question was on board, on her passage down the Hudson in tow of a steamboat, in consequence of a collision with another steamboat, was sunk and disappeared in or near the channel of the river, about the sixteenth day of November, 1846. Immediately after the loss occurred, the defendant came to the point where it happened and employed several persons for several days to search for the boat and cargo by fishing for her, but without success, when he left, and the search was discontinued.

About two months thereafter the boat was discovered near the center of the river, and the plaintiff, with several men in his employ, immediately undertook to save the boat and cargo, and after several days' exertion, attended with more or less expense, danger, and personal risk, succeeded in bringing the boat and cargo to the shore, and raising and unlading her cargo thereon. The place where the boat was sunk was within the county of Greene, and where the tide ebbs and flows about four feet.

It is said by Judge Story, in his treatise on bailments, section 622, that whenever, upon the high seas or on the sea-coast, or elsewhere within the admiralty and maritime jurisdiction (which is ordinarily limited to places within the ebb and flow of the tide), any services are rendered by persons not composing the ship's crew to ships in distress, by saving them or their cargoes from impending perils or losses, or by recovering them after they have been lost, or by bringing them in and preserving them when found derelict, in order to have them restored

to the rightful owners, such persons are denominated salvors; and they are entitled to a compensation for their services, which is known by the name of salvage. As soon as they take possession of the property for the purpose of preserving it, as for example, if they find a ship derelict at sea, or if they recapture it, or if they go on board a ship in distress and take possession with the assent of the master or other person then in possession, in all such cases they are deemed *bona fide* possessors, and their possession can not be lawfully displaced by any third persons. They have a lien on the property saved for their salvage, which the laws of all maritime countries respect and enforce.

In 3 Kent's Com. 245, it is laid down that salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss in cases of shipwreck, derelict, or recapture. And Abbott defines salvage to be "the compensation that is to be made to persons, other than those connected with the ship, by whose assistance a ship or its loading may be saved from impending peril, or recovered from actual loss:" Abbott on Shipping, pt. 4, c. 12, sec. 1. In section 2 it is laid down that "a person who by his own labor preserves goods which the owner, or those interested with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law of England to retain possession of the goods saved until the proper compensation is made for his trouble." For which is cited *Hartford v. Jones*, 1 Ld. Raym. 393, where a person was in possession of goods which he had hazarded his life to save in a ship which took fire, and was ready to deliver them to the owner on being paid for salvage; in an action of trover brought by the owner against him to recover for the goods, Holt, C. J., held that he might retain the goods until payment, as well as a tailor or a hostler or a common carrier. By saving the property the salvor acquires a *jus in re*, and a complete possessory right against all persons claiming an interest in it, to retain it until his compensation is paid, or until he can proceed to enforce his right against it by due course of law: Flanders' Mar. Law, sec. 384; *The Emblem*, Dav. 67, 68; Abbott on Shipping, pt. 4, c. 12, sec. 2; *Cashmere v. De Wolf*, 2 Sandf. 379.

The finder of a thing which is lost on land, belonging to another, and who voluntarily puts himself to some trouble and expense to preserve the thing and to find out the owner, has no lien upon it for the recompense which he may reasonably de-

serve. But the maritime law, from considerations of public policy and commercial necessity, has established a different rule for goods which are lost at sea. Under such circumstances, this law supports the lien in the case of salvage: *Nicholson v. Chapman*, 2 H. Black. 254; *The Emblem*, Dav. 67.

Whether the boat and cargo in this case may possibly be regarded as a legal derelict, it is not on this occasion material to determine. For whether it was so or otherwise, only affects the question of the rate of salvage in the particular case. "In general, the rule of salvage in cases of legal derelict is to give the salvor one half of the property saved. But cases may occur of such extraordinary peril and difficulty, or of such exalted virtue and enterprise, that a moiety even of a very valuable property might be too small a proportion; and on the other hand, there may be cases where the service is attended with so little difficulty and peril, that it would entitle the parties to little more than a *quantum meruit* for work and labor: *Rowe v. The Brig* —, 1 Mason, 377; Flanders' Mar. Law, sec. 386.

From the facts, I think this is a case of derelict in the sense of the maritime law, if the place where the loss happened can be regarded as upon the sea. Judge Story, in *Rowe v. The Brig* —, *supra*, said, to constitute a derelict in that case, it is sufficient that the thing is found deserted or abandoned upon the seas, whether it arose from accident or necessity or voluntary dereliction. He also said that Sir Leoline Jenkins, 1 Sir Leoline Jenkins' Works, 89, had given a true definition in its broad and accurate sense, when he said derelicts were "boats or other vessels forsaken, or found on the seas without any person in them." The boat in question was found apparently forsaken, there was no one in it. It remains to be considered whether the services were rendered in saving property in question lost at sea.

The sea, as defined by Lord Hale, *De Jure Maris*, Harg. Tracts, c. 4, p. 10, is either that which lies within the body of a county or without. That the arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county; and therefore within the jurisdiction of the sheriff or coroner; and that the part of the sea which lies not within the body of a county is called the main sea or ocean. See also *United States v. Grush*, 5 Mason, 290; Angell on Tidelwaters, 4.

It has repeatedly been held that admiralty jurisdiction embraces rivers navigable from the sea within the ebb and flow of

the tide, although the locality may be within the body of a county; and when the locality is within the ebb and flow of the tide, and within the body of a county, a court of common law has a concurrent jurisdiction: Gilp. 526; *In re Jefferson*, 10 Wheat. 428; *Cashmere v. De Wolf*, 2 Sandf. 379; *United States v. Grush*, 5 Mason, 290; *Waring v. Clarke*, 5 How. 441; *Flanders' Mar. Law*, sec. 383.

We have already seen that to constitute a salvage service it is not necessary that it be rendered upon the high seas, it is enough, in respect to locality, that it be within the admiralty and maritime jurisdiction; and that comprehends as well the high seas as the sea-coast and navigable rivers as high as where the tide ebbs and flows, although it should be within the body of a county: *Story on Bailments*, sec. 622.

Some stress in the court below was placed on the decision in *Nicholson v. Chapman*, 2 H. Black. 254, to show that the plaintiff had not rendered any salvage service in securing the property in this case, and of course acquired no lien thereon for his services. But it seems to me that if we attend to the distinction existing between the facts in that case and in this, it will be quite obvious that the decision in that can not govern in this; there, a considerable quantity of timber, the property of the plaintiff, was placed in a dock on the banks of the Thames, but the ropes with which it was fastened accidentally getting loose, it floated, and was carried by the tide as far as Putney, and there left at low water upon a towing-path; Chapman, the defendant, with his wagon removed the timber from the towing-path, which it obstructed, to a place of safety at a little distance; and when the plaintiff sent to demand the timber to be restored to him, refused to deliver it up unless he was paid a recompense for his trouble of drawing the timber from the water-side to the place where it then lay. It was held, and rightly too, as I think, that he had no lien on the timber for the trouble or expense to which he had put himself in the carriage of it. The timber was found lying upon the banks of the river, and was taken into the possession and under the care of the defendant without any extraordinary exertions, without the least personal risk, and in truth with very little trouble.

In the case before us, the boat and cargo had been sunk, and disappeared in or near the channel of the river about the middle of November, and was not discovered again until the lapse of two months, when it in part had risen to the surface of the river. In that condition the plaintiff, with several men in his employ,

after exerting themselves for several days, attended with some personal risk, danger, and expense, succeeded in saving the property. I think the evidence shows the property in question was so situated that it was in great danger of being lost, and that the services rendered to save it by the plaintiff were strictly of the character of salvage services, for which our law has provided recompense, and that it should be a lien upon the goods which have been saved. It may not be, however, of as high a degree of salvagement as is often presented.

The fact that the lien is for salvage does not oust the jurisdiction of a court of common law. The plaintiff has a right to retain the property for his lien, and put the owner to a tender, and then try it in such court. He is not bound to go into admiralty: *Hartfort v. Jones*, 1 Ld. Raym. 393; *Abbott on Shipping*, 662, ed. 1846; *Cashmere v. De Wolf*, 2 Sandf. 379; *Flanders' Mar. Law*, sec. 384; *Nicholson v. Chapman*, H. Black. 259; *Sturgis v. Law*, 3 Sandf. 451.

There were several other questions made by the bill of exceptions, but it is unnecessary to determine them.

The judgment must be reversed and a new trial granted; costs to abide the event.

All the judges except WILLARD, J., who did not hear the argument, concurred.

Judgment reversed, and a new trial ordered.

WRECKED PROPERTY, WHAT IS: See note to *Forster v. Juniata Bridge Co.*, 55 Am. Dec. 512. The words "wrecks" and "shipwrecked goods" are confined to ships and goods cast on shore by the sea, and can not be extended to a boat or other property afloat, not appearing to have ever been cast ashore or thrown overboard or lost from a vessel in distress: *Chase v. Corcoran*, 106 Mass. 288, citing the principal case.

SALVAGE, RIGHT TO, WHEN ARISES: See note to *Forster v. Juniata Bridge Co.*, 55 Am. Dec. 510. Court of common law may have jurisdiction in respect to salvage, and may even determine the validity of a lien for salvage and the extent thereof: *Hawkins v. Avery*, 32 Barb. 556, citing the principal case. The finder of a lost chattel has no lien upon it for any expense incurred in respect to it, either for rescuing or preserving it, except for salvage, by the common law or the statute concerning wrecks: *New York & H. R. R. Co. v. Haws*, 35 N. Y. Superior Ct. 381, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Dows v. Rush*, 28 Barb. 187, to the point that in replevin by a party having a lien, the plaintiff, as in other cases of replevin, is entitled to a return of the property, and if a return can not be had, then to its value; in *Hubbard v. Hubbard*, 8 N. Y. 199, to the point that, in legal parlance, waters within the ebb and flow of the tide are considered the sea; and in *Harley v. Gawley*, 2 Saw. 9, to the point that the statute of New York (1 N. Y. R. S. 690) refers exclusively to property known at common law as "wrecks."

WRIGHT v. MILLER.

[8 NEW YORK (4 SELDEN), 9.]

TRUST DEED MADE BY WOMAN INTENDING MARRIAGE, SETTling HER LANDS so as to provide for her support during life, and for the education, maintenance, etc., of any children of the intended marriage, or if none, then with remainder to other persons named, vests an equitable interest in the children when born, which can not be divested by a subsequent conveyance made by the mother (the grantor in the trust deed) and the trustee.

CONVEYANCE BY GRANTOR IN TRUST DEED, AND TRUSTEE, of lands settled in trust, is a fraud on the beneficiaries in remainder named in the trust; and equity will entertain a suit in their behalf to cancel it, notwithstanding that they were unborn when the trust was created; that the time has not yet arrived when they are to enter on the enjoyment of the remainder; and that the conveyance was made under authority of a decree of court (fraudulently obtained).

INTENT OF SETTLER IN CREATION OF TRUST MUST BE CARRIED INTO EFFECT unless it contravenes some public policy of the law.

APPEAL from a decree of the supreme court in equity (reported 4 Barb. 600), reversing a decree of a vice-chancellor (reported 1 Sandf. Ch. 103). The facts appear in the opinion.

John A. Lott, for the appellants.

C. O'Connor, for the respondents.

By Court, **JEWETT, J.** Both of the courts below came to the conclusion that the validity of the deed of trust, executed by Hannah Ryerson before her marriage with Ezra W. Miller, to Robert Campbell, can not be questioned by Miller on the ground of fraud as against him, and in that I can see no ground to differ with them.

The assistant vice-chancellor, as I think, clearly showed by his very able opinion that the sales of portions of the trust property to Westervelt and De Garmo were not made in good faith, but for the sole purpose of vesting the title in Miller discharged of the trusts created by the deed to Campbell, and that the suits respectively, in chancery, were brought by collusion with Miller, and at his suggestion, and that the decrees were fraudulently obtained, and therefore void as against his children.

The supreme court, although it differs with the assistant vice-chancellor on that point, agrees with him in the opinion that the omission to insert in the decrees a day for the infant defendants to show cause after they became of full age was erroneous, and that that error might be examined on a bill of review, or on an

original bill; so that if there was no positive fraud shown in obtaining the decrees, yet if the facts on which they were obtained did not warrant them, they might claim relief from them in this suit against Ezra W. Miller, and I entertain no doubt as to the correctness of that conclusion. The supreme court held that Mrs. Miller, by her deed to Campbell, retained the absolute power of disposal of the property conveyed for her own benefit; and that conferred upon her the equitable fee simple, absolute and unqualified, and rendered the intended limitation over for the benefit of her children, qualified as it was, null and void. If that is the true construction of the declaration of trust contained in the deed to Campbell, the supreme court was right in respect to the consequences which it held followed. Mrs. Miller would have such an estate, and the limitation over for the benefit of her children would necessarily be void, because it would be inconsistent with her absolute property.

The reason assigned by Mrs. Miller for executing the conveyance to Campbell, as contained in its recital, was her inability to take the care, burden, and management of the estate of which she was seised, other than by the appointment of some suitable person as a trustee to act for her and on her behalf. The objects which she manifested a desire to attain by making such conveyance were: 1. A partition of the lands which she held in common with others; 2. To make provision out of said lands for a suitable and permanent support and maintenance for herself during her natural life, free from the control of any other person or persons, and to secure the residue, if any there should be, to such children and heirs as she might have, and afterwards to the children of her brother, Samuel E. Ryerson, and their heirs, in case she should die without leaving any child or children her surviving. And failing a child or children of her brother, then the residue to go to the trustee and his heirs.

To accomplish her purposes, she declared in the conveyance the trusts upon which it was made, in substance as follows:

That her trustee, as soon as conveniently might be, in his discretion, should, with her consent, during her life-time, or after her decease, either absolutely sell or lease for a term or terms of years, or otherwise, as he should think proper, so much and such parts of the premises conveyed to him, in the manner described, as should be necessary or advisable to defray all expenses already accrued, or thereafter to accrue, for or towards the bringing up, education, clothing, or support of Mrs. Miller during her natural life; and for or towards the partition, im-

proving, altering, or amending the premises conveyed, or any part thereof, or for the fulfillment of the purposes thereby intended; and that her said trustee should forthwith, after any such sale or sales, or such lease or leases, pay, apply, and dispose of the moneys arising therefrom; in the first place, towards the payment of all costs, charges, and expenses incurred by him, for and towards the execution of the trusts created by said deed (including his commissions), as also the expense of all partitions, exchanges, sales, leases, buildings, repairs, or improvements, made to or put upon such estate towards the settlement of the same for the benefit of Mrs. Miller. And secondly, that her said trustee, after the payment of all such costs, etc., and all such repairs and improvements, etc., before mentioned, out of the said purchase moneys and rents, should forthwith, from time to time, pay over, during her natural life, so much of the residue thereof, for and towards her reasonable support and maintenance, as she might require the same, upon her own separate receipt only, and for her own use, free from any control of any husband she might thereafter marry.

And as to the residue of the moneys so arising from sales and leasings, if any there should be, upon the further trust that said trustee should from time to time, and as often as it might be practicable, put and place the same out at interest, upon certain security mentioned, for the use and benefit of Mrs. Miller during her life-time, and for the use and benefit of her heirs after her death, as thereafter mentioned; or to invest the same, with the surplus interest from time to time arising therefrom, in some good, profitable public stock, to be approved as before stated in respect to the securities to be taken; and after the death of Mrs. Miller, then, upon the further trust that, as soon as conveniently might be, the trustee should pay and apply the residue of said rents and proceeds arising from such sale or sales, lease or leases, occasionally for and towards the bringing up, education, and support of such child or children as she should or might have, in a just and ratable proportion, as might be required during the life of such child or children, if she should leave any child or children her surviving. And lastly, in case Mrs. Miller should die without leaving any child or children her surviving, then in trust that the trustee should pay the residue of said money, and all the net proceeds of the said estate, to the child or children of Samuel Ellis Ryerson, the brother of Mrs. Miller, or their heirs by descent then living, in equal and ratable proportion, according to the rules prescribed by the

statute of distribution of intestates' estates within this state, if any such children or heirs of such children by descent only be then living, and upon failure thereof, then the said trustee or his heirs were to retain and keep and apply the same to his and their own use forever, without any further account thereof.

If, then, we regard this declaration of trust by Mrs. Miller as the disposition of her lands conveyed to Campbell, as we must (4 Kent's Com. 303), can we see from the language employed any intention on her part to reserve to herself an absolute power of disposition of the property, or any part thereof, for her own use? For the intent of the settler in the creation of trusts is what the courts look to, and not to any particular form of words; and that is to be carried into effect unless it contravenes some public policy of the law: Lewin on Trusts, 137.

The deed and declaration of trust in this case were made by a young woman, the owner of undivided parts, as a tenant in common with others of a valuable real estate; expecting soon to be married, and contemplating in that event the probability of having children; unable to take the care and management thereof, except by a trustee to act in her behalf; evidently desiring to exempt it from the control of such person as she should marry, and in the first place to subject so much thereof, or its proceeds arising from sales or leasing, from time to time, as should be sufficient for her support and maintenance during her life, free from the control of her husband or any other person, after the payment of the costs and expenses and commissions, etc., of executing the trust; and in the second place, after her death to apply all the residue of the property and its proceeds for and towards the bringing up, education, and support of her children, in a just and ratable proportion as might be required during the life of such child or children, if she should leave any her surviving, and then to go to their heirs. And if she should die without leaving any child her surviving, then in trust, as to the residue, for the child or children of her brother, S. E. Ryerson, or their heirs, and failing issue of her brother, then such residue to go to the trustee, Campbell, absolutely.

Mrs. Miller, so far as I can discover, manifested no intention or wish to reserve or retain any power of disposition of her property, as it then existed; but intended that it should be sold or leased by her trustee from time to time during her life, in his discretion, and that he from time to time should, out of the proceeds arising from the sales, rents, and income, pay to her so much as should be required to defray the expenses of her

reasonable support and maintenance, upon her own separate receipt, free from the control of any husband she might thereafter marry. And for that purpose she authorized her trustee to sell or lease the whole or any part of the property, in his discretion, from time to time, and to make conveyances therefor. Her interest is in the proceeds of the sales and the rents and income of investments, merely, and limited in amount sufficient to provide for her a reasonable support and maintenance during her life.

The limitation over for the benefit of her children is therefore valid. It is essential to the execution of a trust that the subject should be certain. If the settler in this case intended to reserve to herself the power at her pleasure, to dispose of the property which she committed to her trustee to manage, and that the intended limitation over extended only to what, if anything, happened to remain of this property at her death undisposed of by her, then it would be void. But her power of disposition was limited to so much of the proceeds of the property only as was sufficient to defray the expenses of her reasonable support and maintenance during her life: *Horwood v. West*, 1 Sim. & St. 387.

The case of *Attorney General v. Hall*, Fitz-G. 314, cited by the supreme court, was this: The testator gave to his son and the heirs of his body all his real and personal estate, to his and their own use; and in case his son should die leaving no heirs of his body living, he gave all and so much of his estate as his son should be actually possessed of at the time of his death, to the Goldsmiths' company, for certain charitable uses; and he directed them not to give his son any trouble during his life concerning his estate. The son suffered a recovery of the real estate, and it was held by Lord Chancellor King, Sir J. Jekyell, master of the roll, and Reynolds, chief baron, that as to the personal property "the limitation over was void, as the absolute ownership was given to F. Hall, the son; for it is to him and the heirs of his body, and the company are to have no more than he shall have left unspent, and therefore he had a power to dispose of the whole, which power was not expressly given him, but it resulted from his interest."

The case of *Flanders v. Clark*, 1 Ves. sen. 9, was this: M. Flanders, by a clause in her will, gave one hundred and fifty pounds to her son, the principal to be paid by her executors at such time and proportion as they please; but that he should not dispose of it to any present or future wife; but if he died without

issue, then it should revert to the testatrix's family, and interest at the rate of five per cent to be paid by the executors for what should be in their hands till the whole be paid. The surviving executor directed it to be paid after a certain time to the son, with interest, which time had expired. It was insisted that the son should have no more than an estate for life in it, and not vested immediately, but the payment suspended till his dying without issue at his death; which, as it was personal estate, must be the construction of the words. And that the contingency was good on which it was to revert to the testatrix's family.

Lord Chancellor Hardwicke said the penning of that was particular, so that it could not be determined on any general rule, but on particular circumstances. If the claim had rested on the first part, he would have thought it should go to him as a usufructuary interest during life only, and then over, but the construction must also be on the other part of the clause, directing the executor to pay interest till the whole was paid, which showed that the testatrix received it for his personal benefit; but she had a view that he might die before he made use of it, and therefore he should not dispose of it from her family. He also observed that in the case of *Attorney General v. Hall*, *supra*, the testator gave to his son his personal estate, and if he died without issue, then so much as shall remain to the Goldsmiths' company; the son died with issue, and it was insisted that he had only a usufructuary interest, and so to go over; but it was determined by Lord King that he had the absolute property, and therefore the devise was void; for he had power to spend the whole, which was an absolute gift. That the present case was stronger, for he was then living and therefore had the whole property agreeable to the intent of the testatrix, and accordingly the legacy was decreed to the son without any security.

The case of *Ide v. Ide*, 5 Mass. 500, was a devise to the testator's son P., and his heirs and assigns forever, of certain lands, and also a gift of personal estate, with this clause: "And further, it is my will that if my son P. shall die and leave no lawful heirs, what estate he shall leave to be equally divided between my son I. and my grandson N., to them and their heirs forever." It was held that the devise over to I. and N. was void, as inconsistent with the absolute interest of the first devisee. Chief Justice Parsons, in delivering the judgment of the court, said that the limitation over is not of the estate devised to P., but of what estate devised to him he shall leave. From this ex-

pression it seems very clear that the testator, after having devised an express fee simple to P., intended also that he should have an unqualified power to dispose of it at his pleasure; and if he should dispose of the whole, there would be nothing left subject to the executory limitation. And therefore, whenever it is the clear intention of the testator that the devisee shall have an absolute property in the estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift.

In that case it was held that there was first an express fee simple devised to P., in consequence of which, if not afterwards qualified, he might dispose of the lands at his pleasure; that the limitation over was only of what estate he should leave at his death, which was descriptive only of the estate of which he should then be in possession; that the implication was therefore necessary that the testator intended that P. might dispose of any or all of the estate devised, and leave nothing at his death; that the absolute unqualified interest in the estate devised was therefore given to P., which was inconsistent with the limitation over to I. and N., and was consequently void. And to the same effect are the other cases to which the supreme court referred. All clearly support the principle which the supreme court held applicable in this case; namely, that when real or personal estate is conveyed to a trustee, and the settler reserves to or confers on the *cestui que trust*, by the declaration of trust, the absolute power of disposal of the property for his own benefit, the absolute and unqualified interest in the estate vests in the *cestui que trust*, and any limitation over of the property to another was inconsistent with the gift, and therefore void. Many other cases might be cited sustaining the same principle. *McDonald v. Walgrove*, 1 Sandf. Ch. 275; *Bland v. Bland*, Pr. Ch. 201; *Beachcroft v. Broome*, 4 T. R. 441; *Wynne v. Hawkins*, 1 Bro. C. C. 179; *Sprange v. Barnard*, 2 Id. 585; *Bull v. Kingston*, 1 Mer. 314; *Ross v. Ross*, 1 Jac. & W. 154, are a part of them.

I differ with the supreme court in respect to the construction of the power conferred on Mrs. Miller by her declaration of trust. That court, as I have already noticed, held that it conferred a power of disposal of the whole property in trust. I think it was limited to so much of the proceeds and income of

the property as would be sufficient to provide for her a reasonable support and maintenance during her life.

The power of Mrs. Miller to dispose of the property in trust conferred is very much like the power of the wife in the case of *Upwell v. Halsey*, 1 P. Wms. 651, that I. M., being possessed of personal estate of the value of three hundred and thirty-three pounds, and having a wife and sister, but no issue, by will gave ten pounds to his sister, and directs that such part of his estate as his wife should leave of her subsistence should return to his sister and the heirs of her body, and appointed his wife executrix. On the testator's death the wife married the defendant, and afterwards died, upon which the sister sued the defendant, the second husband, for an account of this personal estate. One objection was, that the widow had a power to dispose of the whole, and her marriage with the defendant was a gift in law, and an execution of that power. But the court said, This will is indeed ignorantly drawn, but if the court can pick out the meaning of it, that ought to take place. That as to what had been insisted on, that the wife had power over the capital or principal sum, that is true, provided it had been necessary for her subsistence, not otherwise; so that her marriage was not a gift in law of this trust money. Let the master see how much of this personal estate has been applied for the wife's subsistence, and for the residue of that which came to the hands of the defendant, let him account.

That decree was founded on the admission that in a case in which the first taker had the power to expend an uncertain part of the thing given, a remainder might be limited over. The uncertainty of the sum which might remain formed no objection.

In the case of *Smith v. Bell*, 6 Pet. 68, the will of B. G. contained the following clause: "Also I give to my wife, Elizabeth Goodwin, all my personal estate whatsoever and wheresoever, and of what nature, kind, and quality soever, after payment of my debts, legacies, and personal expenses, which personal estate I give and bequeath unto my said wife, Elizabeth Goodwin, to and for her own use and disposal absolutely; the remainder, after her decease, to be for the use of the said Jesse Goodwin," the son of the testator. It was held that he took a vested remainder in the personal estate, which came into possession after the death of Elizabeth Goodwin, upon the ground that it was the clear intention of the testator. It was conceded that words could not have been employed which would be better fitted to give the whole personal estate absolutely to the wife, or which

would more clearly express that intention. But that the words employed to give the remainder of the estate to the son, after the death of the wife, expressed that intention with as much clearness as the preceding words did to give the whole estate to the wife. That the limitation in remainder showed that in the opinion of the testator the previous words had given only an estate for life; and upon the ground that such was the intent of the testator, the decree was made, sustaining the limitation over of the remainder to the son.

My conclusion therefore is, that the complainants have a valid interest in the trust fund, and therefore a right to institute this suit to protect it. Their interest is vested and existing, although the time of its enjoyment will not arrive until the death of Mrs. Miller. The trustee was required to invest and accumulate all the proceeds of the sales and leases of the land, with the income thereof not required for the settler's support and maintenance and expenses of executing the trust, and after her death to apply the residue of the estate for the support of her children. The interest of the complainants in the preservation and proper management of the trust fund is obvious. And Miller having wrongfully obtained the possession and control of the fund, and sold and otherwise appropriated it, the complainants, having the reversionary interest in the trust, may properly apply to a court of chancery to have it restored and reinvested in trust for their benefit; and that the decree made by the supreme court is therefore erroneous and should be reversed, and that of the assistant vice-chancellor should be affirmed, with costs in the supreme court.

GARDINER, J., read a written opinion, in which he arrived at the same conclusion with JEWETT, J.

JOHNSON, MASON, and WILLARD, JJ., concurred with GARDINER and JEWETT, JJ., in favor of the reversal of the decree of the supreme court and the affirmance of the decree made by the vice-chancellor.

MORSE and TAGGART, JJ., dissented, and were in favor of an affirmance of the decree of the supreme court.

RUGGLES, C. J., gave no opinion.

Decree of the supreme court reversed, and that of the vice-chancellor affirmed.

TRUST CAN NOT BE REVOKED or the trust estate be applied to other purposes, unless the beneficiary has dissented from the trust: *Stockard v. Stockard's Adm'r*, 46 Am. Dec. 79, note 81, where other cases are collected.

PERSON FOR WHOSE BENEFIT TRUST IS CREATED MAY COMPEL PERFORMANCE thereof, although he may be no party to the contract: *Rodney v. Shankland*, 12 Am. Dec. 70.

COURTS OF EQUITY ENTERTAIN SUITS BY TRUSTEES FOR RELIEF AGAINST FRAUDS by which the rights of persons entitled to equitable interests are prejudiced: *De Bussierre v. Holladay*, 4 Abb. N. C. 125; S. C., 55 How. Pr. 219; *McMurray v. McMurray*, 66 N. Y. 180, both citing the principal case.

COURTS WILL SET ASIDE AS NULLITY JUDGMENT, decree, or award obtained by fraud: *State of Michigan v. Phoenix Bank*, 33 N. Y. 27; *Hackley v. Draper*, 60 Id. 92, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Brick's Estate*, 15 Abb. Pr. 43, to the point that in courts of equity a practice exists where the effect of a decree is to divest an infant of an interest in land, or where a conveyance is required of an infant, and in cases of foreclosure, to give him a day after he comes of age to show cause why the decree should not be binding upon him; in *Thebaud v. Schermerhorn*, 61 How. Pr. 205, to the point that a court has no power to destroy a valid trust; and in *Foster v. Coe*, 4 Lans. 56, to the point that a valid trust may be made of real estate for the benefit of the grantor. It is also distinguished in *Dooper v. Noelke*, 5 Daly, 416; and in *Fellows v. Heermans*, 4 Lans. 254.

HART v. RENSSELAER & SARATOGA R. R. Co.

[8 NEW YORK (4 SELDEN), 37.]

INDEPENDENT RAILROAD COMPANIES OPERATING ROADS WHICH FORM CONNECTING ROUTE, under an agreement which authorizes the agents of each to sell through tickets, are each so far liable for the performance of passage contracts that a passenger may sustain an action against the corporation of whose agent he bought his ticket for loss of baggage, on proof that it was not delivered to him at the end of the trip by the agents of the corporation whose road is the last on the connection.

GENERAL EXCEPTION TO CHARGE WHICH CONTAINS TWO PROPOSITIONS, one of which is clearly right, will not be available, even though the other proposition be erroneous.

APPEAL from a judgment affirming a judgment on a verdict in favor of a passenger, for damages for loss of baggage. The facts appear in the opinion.

Job Pierson, for the appellants.

Nicholas Hill, jun., for the respondent.

By Court, TAGGART, J. It will be unnecessary to notice any of the points or decisions of the judge at the court, except the motion for a nonsuit and the charge of the judge that if the jury thought the sum of money in the chest a proper sum for traveling expenses, the plaintiff was not bound to give notice of it to the defendant. The several requests made by the de-

defendant's counsel to the charge and the refusal of the judge to charge as requested are, as I apprehend, entirely dependent upon the decision of the court refusing to nonsuit the plaintiff. If that decision was right, the refusal of the court to charge the jury as requested was clearly proper in each case where such request was made.

When the plaintiff rested the testimony was slight, and it might be a serious question whether at that time there was sufficient evidence to authorize a jury to render a verdict for the plaintiff, provided it had clearly appeared in evidence at that time that the defendant did not have a continuous road from Whitehall to Troy, or the court is to take judicial notice of the existence of the distinct corporation. The only mode in which it appeared that there was more than one company was in the statement of the defendant's counsel on the motion for a nonsuit.

There was, however, some evidence that the agents of the defendant received the baggage at Whitehall to be conveyed to Troy. The plaintiff paid fare to the agent at Whitehall for passage from that place to Troy and received passage tickets; and it is fairly inferable that she paid the fare to the same agent that took charge of her baggage. These tickets were received and allowed as sufficient passage tickets on board the cars, and part of her baggage was conveyed to and received at Troy.

It is, however, unnecessary to decide that question, for the reason that additional evidence was subsequently given by the defendant, which strengthens the case made by the plaintiff, and the decision of this case upon the motion for a nonsuit must depend upon the sufficiency of the evidence to be submitted to the jury when the evidence closed, and the defendant the second time moved for a nonsuit.

Besides the fact that the plaintiff paid fare through from Whitehall to Troy, and received tickets from agents at Whitehall, which were received and allowed as sufficient passage tickets on board of the cars, and that part of the baggage was conveyed to and received at Troy, the additional facts are proved by the witness Beals; that he was a baggageman in the employment of the defendant, had charge of the baggage-car from Whitehall to Troy, which belonged to defendant, and in which part of the defendant's baggage was carried from Whitehall to Troy, and that he once went into the other baggage-car, which he says the agents of the Whitehall road loaded up with emigrants' baggage; and that on his arrival at

Saratoga Springs he entirely neglected assorting and selecting the baggage to be sent to Schenectady from that to be sent to Troy, out of the freight car, which finally came to Troy. It appeared, also, that the plaintiff and her family were emigrants, and that sometimes through tickets were sold for emigrants or second-class passengers.

I am satisfied from this evidence that the refusal of the judge to nonsuit the plaintiff was right. The court charged the jury that it was for them to say whether it was proved that the defendant by its agents received the baggage and agreed to carry it to Troy, and on the decision of the motion for a nonsuit, after all the evidence was given, the court stated it was a matter to be left to the jury.

The court was right both in the charge and in the refusal to nonsuit. There were facts which it was proper to submit to the jury, who were the proper judges of the weight of evidence, and it would have been error to have refused so to submit them. "The law does not regard the judges as possessing any superior qualifications over jurors for judging of facts or the weight or force of evidence of facts. It is a safe and favorite principle of our jurisprudence that facts are to be tried by a jury:" *Adsit v. Wilson*, 7 How. Pr. 66. "When there is evidence on both sides, and the correctness of the verdict or finding on the facts is merely doubtful; in short, when the only complaint against the finding of the facts is that the triers did not correctly weigh or appreciate the evidence, the court have no authority to interfere with the result:" Graham's Pr., 2d ed., 631-633, and the cases there cited. "If the evidence will not authorize the jury to find a verdict for the plaintiff, or if the court would set it aside if so found, as contrary to evidence, it is the duty of the court to nonsuit the plaintiff; but the court should be extremely cautious on the subject of interfering with the province of the jury, who, by the principles and plan of our jurisprudence, have exclusive jurisdiction of the facts of a case:" *Labar v. Koplin*, 4 N. Y. 546; *Pratt v. Hull*, 13 Johns. 334; *Stuart v. Simpson*, 1 Wend. 376.

The question for this court to decide is, whether we should have been bound to set aside the verdict in this cause as against evidence had the question been presented to us in the supreme court sitting as a court of review in this cause upon a case. If there is sufficient evidence to sustain the verdict upon a case, the motion to nonsuit the plaintiff was properly overruled.

I am not only satisfied that there was sufficient evidence to

sustain the verdict, but the jury were right in finding a verdict for the plaintiff; and had they found for defendant, there would have been strong grounds for setting aside the verdict as against evidence.

It is unnecessary to decide whether the charge of the judge in relation to the money in the chest was or was not erroneous. The charge contained two distinct propositions, the first of which was clearly right. The defendant's exception is to the charge generally; then if either proposition in the charge was right, the exception will not be available.

The judgment must therefore be affirmed.

JOHNSON and WILLARD, JJ., read written opinions in favor of affirmance.

Judgment affirmed.

WHEN SEVERAL CARRIERS UNITE TO COMPLETE LINE OF TRANSPORTATION, and receive goods for one freight, they are each liable for damages for loss of or injury to them, subject to reclamation against the party by whose act the damage occurred: *Harp v. The Grand Era*, 1 Woods, 186; *Wheeler v. San Francisco & A. R. R. Co.*, 31 Cal. 53; *Cary v. Cleveland & T. R. R. Co.*, 29 Barb. 56; *Buffit v. Troy & B. R. R. Co.*, 36 Id. 425; *Le Sage v. Great Western R'y Co.*, 1 Daly, 308; *Milnor v. New York & N. H. R. R. Co.*, 4 Id. 358; *Krender v. Woolcott*, 1 Hilt. 227; *Baldwin v. United States T. Co.*, 1 Lans. 130; *Burtis v. Buffalo & St. L. R. R. Co.*, 24 N. Y. 278; *Buffett v. Troy & B. R. R. Co.*, 40 Id. 172; *Burnell v. New York Central R. R. Co.*, 45 Id. 189, all citing the principal case. A railroad company is responsible for baggage delivered to an agent of another line on whose road it runs its cars: *Jordan v. Fall River R. R. Co.*, 51 Am. Dec. 44, note 47. A railroad company is liable as a common carrier of persons, when cars of another railroad containing passengers are transferred to its road, attached to its engine, and wholly committed to the supervision and control of its agents and conductors: *Schopman v. Boston & W. R. R. Co.*, 55 Id. 41, note 45, where other cases are collected.

RAILROAD COMPANY CAN MAKE VALID CONTRACT FOR TRANSPORTATION OF FREIGHT beyond the limits of its own road: *Schroeder v. Hudson River R. R. Co.*, 5 Duer, 61; *Wait v. Albany & S. R. R. Co.*, 5 Lans. 477; *Kessler v. New York Central R. R. Co.*, 7 Id. 64; *Maghee v. Camden & A. R. R. Co.*, 45 N. Y. 518; *Milnor v. New York & N. H. R. R. Co.*, 53 Id. 367, all citing the principal case. The agent of a railway company may bind his principals by a contract for the carriage over other roads running in connection with his own: *Quimby v. Vanderbilt*, 17 Id. 313, citing the principal case. And railroad companies, even where there is nothing special in their charters in relation to the matter, are authorized to make arrangements between themselves for the joint ownership of locomotives to run over both roads: *Olcott v. Tioga R. R. Co.*, 27 Id. 560, citing the principal case.

GENERAL EXCEPTION TO CHARGE CONTAINING SEVERAL PROPOSITIONS must be disregarded, unless all the propositions are erroneous: See *Haggart v. Morgan*, 55 Am. Dec. 350, note 354, where numerous other cases are collected. The principal case is cited in support of this proposition in the fol-

lowing cases: *Jolly v. Terre Haute D. Co.*, 9 Ind. 426; *City of Aurora v. Cobb*, 21 Id. 515; *Kluender v. Lynch*, 2 Abb. App. Dec. 546; S. C., 4 Keyes, 384; *Rider v. Union India Rubber Co.*, 4 Bosw. 179; *Oldfield v. New York & H. R. R. Co.*, 14 N. Y. 315; *Chamberlain v. Pratt*, 33 Id. 52; *Walsh v. Kelly*, 40 Id. 557.

PEOPLE v. COOK.

[8 NEW YORK (4 SELDEN), 67.]

ACTION IN NATURE OF QUO WARRANTO, authorized by New York code of procedure to be brought for determining the title to a public office, being a civil, not a criminal, proceeding, is to be reviewed by appeal, not by writ of error.

VERDICT MAY BE DIRECTED INDEPENDENT OF CONSENT OF PARTIES, whenever the party on whom the burden of proof lies wholly fails to sustain it by evidence.

ISSUE INVOLVING ACTUAL FRAUD is wholly unsustained by evidence of mere irregularities unaccompanied by fraudulent intent, or by proof of fraudulent intent unaccompanied by acts done for carrying it into effect; and if either be the only proof offered by the party charging fraud, the judge may direct a verdict for the other party.

SUPREME COURT OF NEW YORK, in an action of *quo warranto* to review election of a state officer, is not restricted to correcting mistakes of the canvassing officers, but may go behind their returns, and receive evidence establishing what votes were actually cast and identifying the candidates for whom they were in fact intended.

IRREGULARITIES IN CONDUCT OF ELECTION—such as neglect of inspectors or clerks to take the prescribed oath or to take it in a formal manner; errors in the spelling of names of candidates on ballots cast; action of unauthorized persons (without fraudulent intent) as inspectors, and the like—do not avoid the election, or impair the title to the office of the candidate for whom the majority of votes was actually and intentionally cast. The errors or irregularities which warrant rejecting the ballots are such as operate to deprive lawful electors applying to vote of their privilege, or to receive ballots of persons not entitled to vote.

APPEAL from a judgment of the supreme court, in an action in the nature of *quo warranto*, brought for the purpose of testing the right of defendant to the office of state treasurer. The facts appear in the opinion. The case below is reported 14 Barb. 259.

John C. Spencer, for the appellant.

John A. Collier, for the respondents.

By Court, WILLARD, J. This action was commenced by the attorney general in January, 1852, under title 13, chapter 2, section 432 of the code of procedure. The general object of the

action was to determine whether the defendant or Benjamin Welch, jun., was, by the greatest number of votes, elected treasurer of this state at the general election in 1851. The cause was tried at the Tompkins circuit, in March, 1852, when a verdict was found for the plaintiffs under the direction of the court, and the supreme court in the sixth district refused to set it aside on the bill of exceptions taken at the trial, and gave judgment against the defendant with costs, and adjudged that Benjamin Welch, jun., was entitled to the office. The defendant appealed from the said judgment to this court.

The mode of testing the title of a party to an office prior to the code was by information in the nature of a *quo warranto*: 2 R. S. 581. Although this partook of the nature of criminal proceedings, by reason of the judgment being in some cases followed by a fine, Id. 585, sec. 48, yet it was classed with civil remedies in the third part of the revised statutes. The four hundred and twenty-eighth section of the code abolishes the writ of *quo warranto* and proceedings by information in the nature of *quo warranto*, and enacts that the remedy theretofore obtainable in those forms may be obtained by civil actions, under the provisions of that chapter. The present action was brought under those provisions, and is therefore a civil action. The decisions of the court below are to be reviewed upon the principles applicable to civil actions, and not by those which prevail in criminal proceedings, when the latter differ from the former. The parties in fact stand in the same relation of equality to each other as in other civil actions. Each, on being defeated, is liable to the other, as well for the ordinary costs of the action as for an extra allowance: Code, secs. 308, 309; *People v. Clarke*, 11 Barb. 337. This is so whether the people or Benjamin Welch, jun., be considered as the real plaintiff: Code, sec. 319.

The issue framed by the pleadings was intended to raise not merely the question which party had obtained the certificate of the state canvassers, about which indeed there was no dispute, but which party, Mr. Welch or Mr. Cook, was in truth elected to the office in controversy. The complaint, among other things, alleges "that Benjamin Welch, jun., of the county of Erie, is rightfully entitled to the said office of treasurer, and the said defendant has no right thereto;" and it further alleges "that at the annual election in 1851 the said Benjamin Welch, jun., was by the greatest number of votes given at that election for the office of treasurer of the said state duly elected to that

office." The defendant in his answer, after setting out his title to the office under the certificate of the state canvassers, his giving the requisite security, and taking the prescribed oath, alleges on "his information and belief that at the said general election the greatest number of votes duly given by the qualified electors who voted for any person for the office of treasurer was given for the defendant for such treasurer." The reply impeaches the certificate of the state canvassers for various irregularities, and especially for the omission to canvass in favor of Mr. Welch the votes of the second election district of Chesterfield, in the county of Essex, and the votes of the second election district of the fourteenth ward of the city of New York, and sundry ballots for Benjamin C. Welch, jun., and Benjamin Welch, and it avers that the votes so given and intended for the said Benjamin Welch, jun., and then not canvassed in his favor from Chesterfield and New York, were enough to elect him by the greatest number of votes to the office in question. The issues thus framed, as well as the mode pursued by the respective counsel on the trial, show that the parties intended to litigate, and did in fact litigate, the question whether Benjamin Welch, jun., received at the general election in 1851 a greater number of votes for the office of state treasurer than the defendant. It was not denied that the state canvass afforded *prima facie* evidence that each of the candidates received the number of votes allotted to him; and that their certificate was *prima facie* evidence that the defendant received a majority of the votes. Like all other *prima facie* evidence, it was supposed to be open to contradiction.

These preliminary remarks will prepare us to consider the various questions which have been urged on this appeal.

As the most important questions arise upon the judge's final disposition of the cause at the close of the trial, it is proper to ascertain the precise questions then determined.

On the close of the proof, the counsel for the defendant claimed that it should be submitted to the jury as a question of fact—1. Whether there was any fraud as to the manner of closing the polls and in canvassing the votes in the second district of the fourteenth ward of the city of New York; and 2. Whether the votes given for Benjamin C. Welch, jun., and Benjamin Welch were intended to be given for Benjamin Welch, jun. It was conceded that all other questions were questions of law and not of fact. The judge declined to submit either of these propositions to the jury, holding that there was no evidence to sustain

the allegation of fraud, and inasmuch as the evidence adduced to establish the intention of the electors who voted the ballots having on them the name of Benjamin C. Welch, jun., and Benjamin Welch without the addition of "jun.," was all on one side, and not attempted to be explained or contradicted, and sufficient to establish *prima facie* the intention of those who voted them to vote for Benjamin Welch, jun., no question of fact was therefore left for the jury. The defendant's counsel excepted to the decision. The whole case was then submitted to the judge without argument, and he decided certain points which will be noticed hereafter, to some of which the defendant's counsel excepted, and the jury rendered a verdict for the plaintiffs, under the direction of the court, to which direction counsel also excepted.

The decision of the learned judge, on the two points above mentioned, depends upon the same principles, and I shall therefore consider them together. The fact assumed by him, that there was no evidence of fraud in the one case, and in the other that the intention of the voters was *prima facie* established, was not denied by the counsel for the defendant. It was not pretended that the defendant had given any evidence contradicting that on the part of the plaintiff. Nor did the counsel point out any distinct fact as evidence of fraud in the New York case. (As to the effect of a fact assumed by the court and not denied, see *Beekman v. Bond*, 19 Wend. 444.) The objection, therefore, comes down to a mere question of form, whether the judge is bound to submit to the jury as an open question, to find fraud without evidence in the one case, or in the other to find against a fact *prima facie* established, and which the other party has not attempted to controvert or explain; or whether he may direct a verdict in conformity to such evidence. This presents a point of practice at *nisi prius* which must be settled according to the usage in this state.

This subject may be presented in three aspects: 1. As to the practice on a demurrer to evidence; 2. On failure of proof on the part of the plaintiff; and 3. On a failure of proof on the part of the defendant.

1. On a demurrer to evidence, the party demurring must admit every fact which the jury might find from the testimony. The decision of the cause is thus wholly withdrawn from the jury to the court, and the former have nothing further to do than in a proper case to assess contingent damages: *Gibson v. Hunter*, 2 H. Black. 187; *Cocksedge v. Fanshaw*, 1 Doug. 133, 134, *per*

Buller, J.; *Patrick v. Ludlow*, 3 Johns. Cas. 10 [2 Am. Dec. 130]; *Forbes v. Church*, Id. 159; *Steinbach v. Columbian Ins. Co.*, 2 Cai. 133, 134; *Patrick v. Hallett*, 1 Johns. 241; *Lewis v. Few*, 5 Id. 1; *People v. Roe*, 1 Hill (N. Y.), 470. In the present case there was no demurrer to evidence, for the cause was in truth passed upon by the jury, who gave a verdict for the plaintiff.

2. On a failure of proof on the part of the plaintiff, it is well settled in this state, and has been for half a century, that the plaintiff may be compelled to be nonsuited against his consent: *Clements v. Benjamin*, 12 Johns. 299; *Pratt v. Hull*, 13 Id. 334. And it is laid down as a general rule, that if the evidence would not authorize the jury to find a verdict for the plaintiff, or if the court would set it aside if so found, as contrary to evidence, in such case it is the duty of the court to nonsuit: *Stuart v. Simpson*, 1 Wend. 376; *Demyer v. Souzer*, 6 Id. 436-438; *Wilson v. Williams*, 14 Id. 146 [28 Am. Dec. 518]; *Fort v. Collins*, 21 Id. 109; *Jansen v. Acker*, 23 Id. 480; *Rudd v. Davis*, 3 Hill (N. Y.), 287; *McMartin v. Taylor*, 2 Barb. 356, 361. This rule was sanctioned by the unanimous opinion of the court of errors, in *Rudd v. Davis*, 7 Hill, 529. The English practice on this subject is different, as they never nonsuit the plaintiff against his consent: *Watkins v. Towers*, 2 T. R. 280; *Minchin v. Clement*, 1 Barn. & Ald. 252. Hence with them, one of several defendants is never discharged if there is the slightest evidence against him. There are *dicta* to the same effect by judges in this state, when their attention has not been called to the difference between our practice and that of the English courts: See *Labar v. Koplín*, 4 N. Y. 548, *per* Mullett, J. The true rule is, that a defendant sued in tort with others is entitled to be discharged if the evidence against him be such that if he was sued alone he would be entitled to a nonsuit: *McMartin v. Taylor*, 2 Barb. 456. The power to nonsuit results from the principle that the court is the judge of the law when there is no dispute about facts: *Pratt v. Hull*, 13 Johns. 334, approved by Mullett, J., in *Labar v. Koplín*, *supra*. The practice in relation to nonsuits, or, in present phraseology, dismissing the complaint, is that it may be granted at the close of the evidence on both sides, or at any other time when the plaintiff admits he has no further evidence.

3. On a failure of proof on the part of the defendant. At the close of the cause, if a *prima facie* case be established on the part of the plaintiff, and it is undisputed by the defendant, it has been always usual to direct a verdict for the plaintiff. See

Nichols v. Goldsmith, 7 Wend. 160; *Crawford v. Wilson*, 4 Barb. 504, 518; *Rich v. Rich*, 16 Wend. 676. This rests upon the same principle as the power to nonsuit, that the court is the judge of the law when there is no dispute about facts. Verdicts to an immense amount are daily taken, under the direction of the presiding judge, in cases where the defense has wholly failed; the jury assent to the direction by giving their verdict. The fact thus found is as conclusive upon the parties as if it had been the result of a long deliberation. Nor is there anything in this practice that impairs the rights of the jurors, or the efficiency of trial by jury. It does not conflict with the maxim, *Ad questionem facti non respondent iudices; ad questionem legis non respondent juratores*: Co. Lit. 295 b. To bring a case in hostility to the maxim, it must be shown that a controverted question of fact was decided by the judge without the intervention of the jury. Here was no fact in dispute, and the jury actually gave the verdict.

In the case of *People v. Croswell*, 3 Johns. Cas. 337, the rights of jurors were most elaborately discussed. In his thirteenth proposition (Id. 362) General Hamilton remarks: "That in the general distribution of powers, in any system of jurisprudence, the cognizance of law belongs to the court, of fact to the jury; that as often as they are not blended, the power of the court is absolute and exclusive; that in civil cases it is always so, and may be rightfully so exerted." And it was expressly asserted by Kent, J., in delivering his opinion in the same case: Id. 376. "The opinion of the judges in criminal cases," he observes, "will generally receive its due weight and effect, and in civil cases it can and always ought to be ultimately enforced by the power of setting aside the verdict."

These principles were quoted with approbation by the supreme court in *Snyder v. Andrews*, 6 Barb. 48, and have been approved in many other cases. The judge did not, in the present case, decide the question of fact; he withdrew nothing from the jury; his decision amounted only to a charge to find those issues for the plaintiff. The jury might have refused to do so, or have found the other way without being liable to punishment. The only remedy for such a verdict would have been to set it aside; but the jury acquiesced in the direction, and found for the plaintiff. The cases which show that it is not competent for the court to direct a verdict for the plaintiff, subject to the opinion of the court against the consent of the parties, are not applicable to the question we are considering: *Ely v. Adams*, 19 Johns. 313; *Hyde*

v. *Stone*, 9 Cow. 230 [18 Am. Dec. 501]. The principle decided in *Nichols v. Goldsmith*, 7 Wend. 163, and *Rudd v. Davis*, 3 Hill (N. Y.), 287; affirmed in error, 7 Id. 529; *Crawford v. Wilson* and *Rich v. Rich*, *supra*, sustain the ruling of the court below.

If the refusal of the learned judge to submit the foregoing questions to the jury be deemed a refusal to permit the defendant's counsel to address the jury thereupon, it was not the subject of an exception. Whether counsel shall be permitted to address the jury is a matter resting in the sound discretion of the court; this has always been so treated. Under the former constitution there was a time when all causes originating in justices' courts were required to be submitted in the supreme court without an oral argument. The courts in this state have for a long time limited the number of counsel to address the jury when a cause was to be summed up, and to examine and cross-examine witnesses. The convention of judges held in August last, under section 470 of the code of 1852, embracing the judges of the supreme court, superior court of New York, and court of common pleas of that city and county, by a general rule, restricted the number of counsel to be heard on each side, at general and special terms, to one, and the time beyond which they should not be heard, except when otherwise ordered, to two hours each: See rules 13 and 14. A similar rule exists in the supreme court of the United States, and this court limits the number to be heard on a side. All these restrictions imply that the right to address the jury or the court is not an absolute, unqualified right, to be exercised by as many counsel as may be employed.

The courts, on the same principle, limit the number of witnesses to be examined on a side, in all collateral issues: *Nollon v. Moses*, 3 Barb. 36; *Spear v. Myers*, 6 Id. 445; and doubtless may do so on the main issue. On the same principle, too, it rests in the discretion of the court whether a witness once examined may be recalled and examined further on the same or other subjects: *Law v. Merrills*, 6 Wend. 276, *per* Walworth, Chancellor; *People v. Mather*, 4 Id. 246 [21 Am. Dec. 122]; Phill. Ev., Cowen & Hill's notes, 711, 788; *Dunckle v. Kocker*, 11 Barb. 387. If the judge at the trial errs in the exercise of this discretion, the remedy is by motion for a new trial on a case. It is well settled that a bill of exceptions can not be taken to review the exercise of discretionary power: Phill. Ev., Cowen & Hill's notes, 711, 788, where many of the cases are collected. In this aspect of the case, then, an appeal will not lie for the refusal of the judge to permit the counsel to address the jury on the

questions now under discussion, there being no question of damages to be passed upon. In point of form, therefore, on the facts assumed by the learned judge, there was no error in directing a verdict for the plaintiff instead of submitting the matter as an open question to the jury. The manner of stating the question on the record is not according to the usual practice, but it is nevertheless intelligible.

I have hitherto treated the case as if the facts in relation to those points were all on one side, as stated by the judge; if so, there was no fact in dispute. Whether the judge was right in that assumption or not could more properly be reviewed in the court below on a case containing the whole evidence. The exception does not point to the fact that the judge was wrong in his assumption of what was established by the evidence, but to the legal conclusion which he deduced from it. The learned judges in the court below have, moreover, discussed these questions of fact in an able and elaborate manner, and shown to my satisfaction that the judge at the trial was right in his assumption. It would be a waste of time to travel over the same ground. It is well settled, also, that when, on the trial of a cause, a fact is assumed by the court and counsel to exist, and the case is disposed of at the trial upon such assumption, the non-existence of the fact in the case presented to the court on a motion for a new trial can not be urged in opposition to the application for a new trial: *Beekman v. Bond*, 19 Wend. 444. This must be so, likewise, on a bill of exceptions, when the non-existence of the fact is not made a point in the court below. The range of the discussion, however, on this appeal, has made it necessary, or at least expedient, that a few words should be added on this branch of the subject; and—

1. Of the question of fraud in the New York case. Fraud can never, in judicial proceedings, be predicated of a mere emotion of the mind, disconnected from an act occasioning an injury to some one. A fraudulent transaction implies a wrong done as well as a person wronged. The term "fraud," when applied to inspectors of an election, implies, *ex vi termini*, that some legal voter has been designedly and wrongfully deprived of his vote, or that an illegal vote has been purposely and unjustly received by those officers, or that a false estimate has been imposed upon the public as a genuine canvass. In the present case, however, the judge was asked to submit to the jury to find fraud in the inspectors of the second district of the fourteenth ward in the city of New York, from certain actual or supposed

irregularities, in a case where it appears from the record that it was not shown or alleged on the trial that any illegal votes were received or legal votes rejected, and in the face of the testimony of all the inspectors, embracing both political parties, and which was not contradicted, that the votes of the district were fairly and honestly received, and accurately canvassed and returned. With respect to that return, the defendant is the assailant and holds the affirmative. It will be shown, in another connection, that it should have been received by the county canvassers. The legal presumption is in its favor. It is no answer to this that the irregularities of the inspectors have rendered it impossible to detect the fraud. The decision of the learned judge with respect to these irregularities belongs to another exception. We are now upon the exception to this decision refusing to submit to the jury to find fraud without evidence in closing the polls and canvassing the votes in that district. This is quite a different matter from the question of irregularity, and must be kept distinct from it. The judge did not err in refusing the motion of the defendant's counsel in this respect.

2. On the refusal to submit to the jury whether the votes for Benjamin C. Welch, jun., and Benjamin Welch were intended for Benjamin Welch, jun. What that decision in reality was, and the grounds of it, have already been shown; a few words more will be added. The court did not treat the question of the intention of the voters who deposited the defective ballots, as a question of law; it was treated throughout as a question of fact, to be established by the evidence. The ground taken by the judge was that the intention of the voters to vote for Benjamin Welch, jun., was *prima facie* established, and not attempted to be explained or contradicted, and there was, therefore, no question of fact for the jury. His decision was a mere direction or charge to the jury to find for the plaintiff with respect to those matters, and they found accordingly. The evidence was not withdrawn from them, but in truth passed upon by them. It was not, indeed, submitted as an open, controverted question, or summed up by counsel. But when that intention of the voter was placed beyond dispute, as it was in this case, by the evidence, it became a pure and unmixed question of law whether those defective ballots should on this trial be allowed to Benjamin Welch, jun., or not. The result was the same as if the judge had charged the jury that if they believed that the voters intended by the defective ballots to vote for

Benjamin Welch, jun., of which there was no doubt, those votes, in point of law, should be estimated by them to Mr. Welch.

It was unnecessary to decide that those defective ballots should have been allowed and canvassed to Benjamin Welch, jun., by the state canvassers. The court did not say, as matter of law, irrespective of the extrinsic facts proved, that Benjamin C. Welch, jun., and Benjamin Welch without the "jun." meant Benjamin Welch, jun. It was the extrinsic evidence that made the intention of the voters obvious.

In my own opinion, the state canvassers act ministerially in the main in making their certificate. They can not be charged with error in refusing to add to the votes for Benjamin Welch, jun., those which were given for Benjamin C. Welch, jun., and for Benjamin Welch without the "jun." They had not the means which the court possessed on the trial of this issue of ascertaining by evidence *aliunde* the several county returns the intention of the voters and the identity of the candidate with the name on the defective ballots. Their judicial power extends no further than to take notice of such matters of public notoriety as that certain well-known abbreviations are generally used to designate particular names, and the like. It is enough, probably, to say that the legislature has not clothed either the state officers or the subordinate boards of inspection with power to hear and determine by the means of evidence *aliunde* the return the intention of the voters. The strictness with which these boards should be held to the record before them is dictated by sound policy and enlightened wisdom. Who could desire to see the close of every canvass followed up by a rush of heated partisans to disprove by their testimony the estimate made by the proper authority?

But the question whether the state canvassers ought to have allowed to Mr. Welch the defective ballots is not necessarily involved in this case, if this court shall be of opinion that on the trial of this cause it was competent to go behind both the certificate and ballot-box to ascertain the voters' intention in depositing the ballots in controversy. It has been strenuously insisted by the counsel for the appellant that the court does not possess this power; he insists that the court can go no further in this action than to correct mistakes of the returning officers, and to prove facts which show the return to be false, and to make it such as it ought to have been made by the canvassers. Such errors, whether intentional or otherwise, no doubt can be corrected by this action, and many of the cases

referred to on the argument did not require a more searching remedy. This question is of sufficient importance to be viewed upon principle and authority.

1. Upon principle: It is by the popular expression by the voters, through the ballot-box, that a title is derived to an elective office. The certificate of the board of canvassers is mere evidence of the person to whom a majority of the votes were given. The certificate may, indeed, be conclusive in a controversy arising collaterally, or between the party holding it and a stranger. But when this proceeding is instituted in the name of the people, it loses its conclusive character, and becomes only *prima facie* evidence of the right. The pleadings in this case, it has already been shown, were so framed as distinctly to present the question whether the ballots now in controversy were intended by the voters for Benjamin Welch, jun. If the issue thus tendered by the plaintiff was irrelevant, the defendant should have moved to strike it out; by taking issue upon it, and going down to trial, and litigating the facts involved in it, he concedes its materiality. This concession, it is true, is not conclusive upon the court; but I think it was the intention of the code, and certainly it was of the pleaders on both sides, that the issue should involve an inquiry into the right to the office, as derived from the highest source of popular sovereignty, and not merely the right derived from the certificate. It will be seen that the pleadings in this case are essentially different from the precedents under the former practice in analogous proceedings: See the forms in *People v. Van Slyck*, 4 Cow. 297.

2. Upon authority: In the case of *People v. Ferguson*, 8 Cow. 102, decided in 1827, a new trial was granted by the supreme court, to enable the relator to prove on the trial of the issue that votes given for H. F. Yates were intended by the voters for Henry F. Yates. That was an information in the nature of a *quo warranto*, to determine whether Ferguson or Yates was elected clerk of Montgomery county. If, on that trial, fourteen ballots on which were written H. F. Yates were allowed to Henry F. Yates, he would be entitled to the office instead of Ferguson, to whom the certificate was given by the county canvassers. That case is exactly in point, and goes further, indeed, than is necessary in the one under consideration. The late Chief Justice Savage, in the course of his opinion in that case, says you may look beyond the ballot-boxes for testimony as to the intention of the voter, and that the question of intention is fairly for the jury. This doctrine was approved by the same court in

People v. Seaman, 5 Denio, 409, decided in 1848, in a similar proceeding to test the title of the parties to the office of supervisor.

In the earlier case of *People v. Van Slyck*, 4 Cow. 297, an information in the nature of a *quo warranto* was brought to oust the defendant from the office of sheriff. It was insisted by the defendant's counsel that the decision of the canvassers was conclusive, and could not be reviewed but by *certiorari*, and that the certificate of the canvassers could not be impeached in this way; but the court held that the certificate was not conclusive; and on a special verdict, finding that the vote of one town had been improperly rejected by the county board, which if received would have altered the result, they ousted the defendant. This case shows that the court may go behind the certificate. It shows also that it is the election, and not the certificate of the canvassers, that gives the right to an office.

In *People v. Vail*, 20 Wend. 12, the case of *People v. Ferguson*, *supra*, is expressly recognized as sound law; and Bronson, J., says that in those legislative bodies which have the power to judge of their own members, it is the settled practice, when the right of the sitting member is called in question, to look beyond the certificate of the returning officers; "and I think," he observes, "a court and jury, with better means of arriving at truth, may pursue the same course." We are not called upon to say that every possible question arising under the election law may be corrected in this way; it is enough that the principle contained in *People v. Ferguson*, *supra*, sustains the ruling of the court below. That case has stood the scrutiny of more than a quarter of a century; and has neither been disturbed by the new constitution nor the repeated revision of the election law. I see nothing in the present case that requires us to depart from it. Nor is there any danger to be apprehended to the security of our institutions by pursuing this practice. The right to an office is no higher than a right to life, liberty, or property. There is no principle that should withdraw the first from the cognizance of a court and jury to the exclusion of the last; both will, indeed, be safe under the administration of the ordinary tribunals.

It now remains to notice the other questions of law which are presented by the record.

1. The learned judge decided, in his direction to the jury, that the votes given in the western district of the first ward of the city of Buffalo were properly canvassed and allowed to Mr.

Welch, notwithstanding the inspectors took the oath of office upon a book called "Watts' Psalms and Hymns," and not upon the gospels; notwithstanding these challenged voters and two of the clerks were sworn upon the same book, it being beyond dispute that in each case the affiants supposed the book to be a testament or bible, and were ignorant of the fact that it was otherwise. To this the defendant's counsel excepted. This exception is not well taken, for two reasons: 1. The neglect of the inspectors or clerks to take any oath would not have vitiated the election. It might have subjected those officers to an indictment if the neglect was willful: *Laws of 1842*, p. 132, sec. 19, and 2 R. S. 696, sec. 38; *In the Matter of the Election of the Directors of the Mohawk and Hudson Railroad*, 19 Wend. 135; *Greenleaf v. Low*, 4 Denio, 168; *Weeks v. Ellis*, 2 Barb. 320. These and numerous other cases show that the acts of public officers, being in by color of an election or appointment, are valid so far as the public is concerned. 2. The oath in this case, though irregularly administered, was a valid oath. If the party taking it makes no objection to the mode of administering it at the time, he is deemed to have assented to the particular form adopted, and is liable to all the consequences of perjury, as if it had been administered in strict conformity to the statute: *Phill. Ev.*, Cowen & Hill's notes, 705; *Id.* 1503; *Cady v. Norton*, 14 Pick. 236; *Commonwealth v. Buzzell*, 16 Id. 153. The challenged voters are as amenable to an indictment for perjury as if they had been sworn on the gospels. The learned judge, therefore, committed no error in holding that the votes in Buffalo, above mentioned, were properly canvassed and allowed to Mr. Welch.

2. The ballots for Benjamin Welch, jun., in the several election districts in Herkimer county, in which the specimen ballot headed "State" had at the bottom "For county judge, Ezra Graves," were properly canvassed and allowed to Mr. Welch. Whatever effect this might have upon the ballot for county judge, it had none upon other candidates upon the state ticket. The statute forbids inserting on the same ballot more than one name for the same office: *Laws of 1842*, p. 118, sec. 8. The judge did not err, therefore, in holding that the Herkimer votes were rightfully allowed to Mr. Welch.

3. There was no good reason for rejecting the votes in the second election district of the town of Chesterfield. There was sufficient proof that the gentlemen acting as inspectors were such *de jure*; and if not, it will be shown under another head

that they were at least so *de facto*, and that that was sufficient to support their acts. The county canvassers of the county of Essex had no right to reject the certificate of the board of inspectors. It was regular on the face, and presented to them in time. The statute has nowhere invested them with the power which they assumed to exercise: Laws of 1842, pp. 124, 125. The fifteenth section, which authorizes the county board to depute one of their number to return the certificate of the district inspectors to those officers, to supply omissions and correct clerical mistakes if any exist, and to adjourn in the mean time to allow the corrections to be made, is all the correcting or revising power which the county board has over the district board. The corrections in this case are to be made by the latter board, and they are not permitted to alter any decision before made by them. The learned judge was right, therefore, in holding that those votes should be allowed, notwithstanding they had been rejected by the county canvassers, and were not included in the estimate of the state canvassers.

4. The votes given in the second election district of the town of Williamsburgh were canvassed by the county and state canvassers to Benjamin Welch, jun. The defendant, in seeking to reject them, holds the affirmative. He takes upon himself the business of showing either that the number of votes have been untruly canvassed, or that some other facts exist which invalidate the certificate. 1. From the record it appears that no illegal votes were received in said district at said election, and no legal votes were offered and rejected; that all the votes given at said election were honestly canvassed to the respective candidates, and a true and faithful return of said votes were made by the inspectors. There was no dispute about these facts, and the evidence was received without objection. The defendant, therefore, failed to show that he sustained any injury by any act of the inspectors, or that their certificate did not truly state the result of the popular will at that poll. 2. The defendant, failing to show the return false, seeks to reject it altogether, on account of the non-compliance by the inspectors with some of the provisions of the election laws. There are various duties enjoined by law on the inspectors, the great objects of which are: 1. To afford to every citizen having a constitutional right to vote an opportunity to exercise that right; 2. To prevent every one deprived of that right from voting; and 3. To conduct the election in such a manner, in point of form, that the true number of legal votes can be ascertained with certainty. If all

these objects be accomplished, as they seem to have been in this case, to reject the whole votes because the inspectors failed to comply with every prescribed regulation would be, as was well remarked by one of the judges in the court below, to place a higher value on the statute regulation than on the right itself; it would be a sacrifice of substance to form. It is proper, however, to examine these objections, and to see whether the irregularities complained of have rendered the state of the poll in that district so doubtful and uncertain that no reliance can be placed upon it.

The first objection I shall consider relates to the inspectors of the election. It appears by the record that the inspectors who opened the polls in the morning were not regularly sworn, and that they were appointed by the supervisors, town-clerk, and a single justice, "inspectors of the election for the second district of the town of Williamsburgh, to act until others are appointed." It was dated November 4, 1851. It appears that there were inspectors elected for that district, but they were not present at the opening of the polls. There can be no doubt that this appointment was a colorable authority for those inspectors, and that their acts in that capacity were valid, so far as third persons are concerned. Their omission to take the oath in due form did not invalidate their acts. The defendant's counsel does not deny that these inspectors were officers *de facto*; but he insists that their appointment made them inspectors for the entire election, and thus vacated the office of the elected inspectors; and if so, the latter could not act at all, and were not even inspectors *de facto*. I think this result would follow if the inspectors in question had been legally appointed under the twenty-second section of the act: Laws of 1842, p. 117. But there was a defect in their appointment. The statute contemplates that at least two of the justices should sign it, without which, in the country towns, there would not be a majority of the appointing power. In the absence of proof to the contrary, we must intend that there were the usual number of justices in the town. There not being the requisite number of officers concurring in the appointment, it was defective. There was still another defect. The statute contemplates that the inspectors should be appointed to supply the vacancy of those absent. Although it is silent as to the duration of their offices, yet it is obviously for that election. In this case, they were appointed "to act until others were appointed." The town officers supposed that they had the right of making an appointment during their pleasure. I think they had no such power. The appoint-

ment merely gave them a colorable authority, and did not displace the elected inspectors. The latter, on appearing at the polls, had a right, as inspectors *de jure*, to take the charge of the election and to make the return.

The statute requires that the inspectors, after taking the oath, shall appoint two clerks, who shall take the constitutional oath: Laws of 1842, p. 118, secs. 3, 4. This is directory. If no clerks can be procured, the election is not to fail. The inspectors must perform the duty which ordinarily is devolved upon the clerks. The failure of the clerks to take the oath did not render their acts void. The occasional interference of more inspectors than three does not prejudice the return, since the whole election was conducted by inspectors who were at least such *de facto*, and for the most of the time by those who were such *de jure*.

It is not to be disguised that there were irregularities in this district, for which the inspectors were censurable, and perhaps liable to be punished by indictment. Had the defendant's counsel contended on the trial that these irregularities rendered the state of the canvass uncertain, he should have asked to go to the jury with the question whether the votes were accurately canvassed or not. By omitting to do so, and by conceding that the questions were questions of law and not of fact, and allowing it to be proved without objection that the votes were accurately canvassed, nothing was left but the abstract question whether an omission to comply with the statutory requirements in question *per se* invalidated the votes of that district. If these requirements be directory, and not jurisdictional, the learned judge was right in deciding that the votes were properly allowed. The cases on the subject of what provisions in the statute relative to the elections are directory, and what are jurisdictional or imperative, are elaborately collected and examined by the learned judges in the court below, and I do not deem it necessary to review them at large. I will merely refer to some of them: *Doughty v. Hope*, 3 Denio, 251; *Elmendorf v. Mayor of New York*, 25 Wend. 696; *Merchant v. Langworthy*, 6 Hill, 646; *Ex parte Heath*, 3 Id. 43; *Jackson v. Young*, 5 Cow. 269 [15 Am. Dec. 473]; *Striker v. Kelly*, 7 Hill, 9; *People v. Peck*, 11 Wend. 604 [27 Am. Dec. 104]; *In re Mohawk and Hudson R. R. Co.*, 19 Id. 143; and see Smith on Statutes, 782, 799, where the cases are reviewed. Upon the analogy of these and other cases, the requirements of the statutes which were not complied with are clearly directory.

An officer *de facto* is one who comes into office by color of a

legal appointment or election; his acts in that capacity are as valid, so far as the public is concerned, as the acts of an officer *de jure*; his title can not be inquired into collaterally. The doctrine on this subject will be found in the following cases: *People v. Bartlett*, 6 Wend. 422; *People v. White*, 24 Id. 525, 539, 564; *People v. Covert*, 1 Hill (N. Y.), 674; *People v. Stevens*, 5 Id. 616; *People v. Hopson*, 1 Denio, 575; *Weeks v. Ellis*, 2 Barb. 324; *Margate Pier Corp. v. Hannam*, 3 Barn. & Ald. 266, 270. Third persons can justify under officers *de facto*: *Weeks v. Ellis*, *supra*; *Margate Pier Corp. v. Hannam*, *supra*; *Wilcox v. Smith*, 5 Wend. 231 [21 Am. Dec. 213]. Had the sheriff or constable arrested a disorderly person, under authority from either of the boards of inspectors, who were merely such *de facto*, he would have been protected. The person of the voter is as securely guarded under the authority of inspectors *de facto* as of inspectors *de jure*. A challenged voter swearing falsely before a *de facto* board of inspectors is as much liable to punishment under the statute as if the oath had been administered by inspectors *de jure*: Laws of 1842, p. 134, sec. 1; 2 R. S. 681, sec. 1; *State v. Hascall*, 6 N. H. 352; 2 Phill. Ev., Cowen & Hill's notes, 1101; *Van Steenbergh v. Kortz*, 10 Johns. 167; *Howard v. Sexton*, 1 Denio, 440. In the latter case Bronson, J., says: "If parties should go to trial before a judge or justice of the peace who had not taken the oath of office, I think a witness who should swear false on such trial could not escape the pain of perjury." And it is laid down by 1 Hawk. P. C., c. 69, sec. 4, that a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of such demise:" Bac. Abr., tit. Perjury, A. Such officers, after the demise of the king and before notice, are merely officers *de facto*.

The learned judge did not decide that inspectors might lawfully omit, at their pleasure, any of the requirements of the statute; he merely held that the votes received in the said district, under the circumstances disclosed, were not to be rejected on the trial of this issue, but should be allowed to the respective candidates. The counsel for the defendant contends that the failure of the inspectors to comply with any of the various provisions of the statute is analogous to an erroneous decision of a judge at *nisi prius*, in receiving or rejecting evidence improperly. But the cases are in no respect parallel. The error of the judge in the latter case has a direct tendency to injure the

party against whom the decision is made. The error of the inspectors in the former case has no tendency to injure one candidate more than the other. Indeed, it has no necessary tendency to injure anybody. It is the error, moreover, of the inspectors, and not of the court.

5. The learned judge did not err in his direction to the jury that the votes in the second district of the fourteenth ward of the city of New York were improperly rejected by the county canvassers. It has already been remarked, in considering the Chesterfield case, that the county board had no right to reject a certificate of the district inspectors which is fair on its face, and delivered to the proper officer within the time allowed by law. The county board should have received and returned these votes to the state canvassers. This point, however, is not of much importance in this stage of the cause, since either party had a right to go behind the certificate and show it to be false. Had the county board of New York conducted the canvass legally, the burden of proof would have been shifted from the plaintiff to the defendant.

There are but two points in this part of the case which have not already been disposed of against the defendant under some one or more of the preceding heads: 1. Closing the outer door at sundown and preventing any person from entering the room where the poll of the election was held; and 2. Receiving the votes of those already in the room at the time the outer door was closed, ten or fifteen in all. In considering these points, it must be borne in mind that it is not enough for the defendant to show that the poll was kept open after sundown, or that the door was shut before that hour; such a technical deviation from the direction of the statute can not avail him unless he can also show that the hour of opening and closing the poll is of the essence of an election. He did not propose to show that any legal voters were excluded by the act of closing the outer door, or illegal ones received after sundown; he conceded that the questions arising upon those facts were questions of law for the court, and the learned judge made his decision with the fact distinctly appearing that no legal votes were rejected or illegal ones received.

It must be borne in mind further, under this branch of the subject, that the constitution is imperative with respect to the day on which our annual elections shall be held: Const., art. 3, sec. 9. Should the legislature direct it to be held on a different day, as they are empowered by that instrument to do,

such day would be imperative also. The constitution is silent with respect to the hour of the day at which the poll shall be opened and closed; the regulation of that matter is thus left to the legislature, and when they do not interfere, to the common law. The statute requires that the poll shall be open in the cities at sunrise, and shall be kept open till the setting of the sun: Laws of 1842, p. 118, sec. 6. 1. No elector had any right to complain if the door was shut and the poll closed at sundown; he was not deprived of any right. The act of closing the outer door at that time can not be urged as prejudicial, unless it is shown that some one was prevented from voting. 2. The receiving the votes of electors already in the room has not been shown to be an error prejudicial to the defendants. Whether these votes were for him or against him does not appear; if they were all against him and were now rejected, it would not alter the result; if they were in his favor, he has no right to complain: *Matter of Chenango County Mutual Insurance Co.*, 19 Wend. 635, 638.

The statute contains no words forbidding the poll to be held open after sundown, or rendering the election void if the poll be not opened and closed as therein required. The inspectors may, indeed, be liable to an indictment for the willful violation of any of the statute regulations, but that is quite a different matter from the point we are considering. If the particular hour of the day for opening and closing the poll be directory, and not imperative, the learned judge did not err in holding that the votes in the district in question should be allowed to Mr. Welch. The cases on the subject of what acts are directory and what imperative have already been stated, and need not be repeated. It has been held, with regard to corporations, that the words "between the hours of ten in the morning and two in the afternoon" are not imperative, but merely directory, and an election may well be begun at any other reasonable hour: *Angell & Ames on Corp.* 94. The particular hour in the day is not the essence of the thing required to be done. Should inspectors, on a cloudy day, and misled by a defective timepiece, close the polls a few minutes before sundown, or receive a few votes after that hour, if the time of day be of the essence of the thing, the whole election for that district would be void. I can not subscribe to this doctrine. I think the statute is directory. Again, to show more clearly that the hour of closing the polls is directory, and not imperative, suppose, after every voter in the district had deposited his ballot, the inspectors should have

closed the poll, although the sun was still an hour high; or suppose they had kept it open an hour after sundown, and no vote had been offered or received: who, in either case, would have had a right to complain? Not the candidates, surely; for with respect to them, the whole object of opening the poll at all had been accomplished. If the irregularity were willful, the inspectors might, indeed, be punished by an indictment; and this, I apprehend, is the extent of the remedy.

I do not intend to assert that there may not be departures from the statutory requirement, with respect to the time of opening and closing the polls, and with respect to some other matters which would put in hazard the whole vote of the district; it will be time enough to pass upon such a case when it arises. It is probably impracticable to prescribe a rule which will enable us to determine in all cases what irregularities of the inspectors will vitiate an election. It may be safely affirmed that if the irregularity does not deprive a legal voter of his right, or admit a disqualified person to vote; if it casts no uncertainty on the result, and has not been occasioned by the agency of a party seeking to derive a benefit from it, it may be overlooked in an action of this kind, when the issue is as to which candidate received the greater number of votes for a particular office at a given election.

There is nothing in this principle which holds out the slightest invitation to disorder at the polls. Should a gang of rowdies gain possession of the ballot-box, during or after the close of an election, before the canvass, and destroy the whole or portions of the ballots, or introduce others surreptitiously into the box, so as to render it impossible to ascertain the number of genuine ballots, the whole should be rejected. It would, in such case, be the duty of the district inspectors to certify and declare the fact. But the county canvassers, with a regular return from the district inspectors before them, which is fair on its face, have no right to go behind it, and prove that its estimates are unreliable by reason of rowdyism at the polls or irregularities of the inspectors. They must act upon it as a regular return, and leave the parties aggrieved to their remedy through the courts of justice.

There were some exceptions of minor importance taken at the trial, which I have not noticed, because they were either frivolous or immaterial, and have not been urged on the argument. The objection that the canvass in the second district of the fourteenth ward of New York was not public does not

apply to the state ticket, and has therefore not been noticed. The judgment of the supreme court should be affirmed.

RUGGLES, C. J., and GARDINER, JEWETT, MASON, and MORSE, JJ., concurred.

TAGGART, J., delivered a dissenting opinion.

JOHNSON, J., did not hear the argument.

Judgment affirmed.

GRANTING COMPULSORY NONSUIT: See *Mateer v. Brown*, 52 Am. Dec. 303, note 312, where other cases are collected. The court may direct a verdict, when a contrary finding would be set aside as against evidence: *Juliand v. Rathbone*, 39 Barb. 103, citing the principal case. And in such a case it is the duty of the court to direct a verdict: *Liddle v. Hodges*, 2 Bosw. 544, also citing the principal case.

PROCEEDING BY QUO WARRANTO IS, IN ILLINOIS, CRIMINAL PROSECUTION: See *Donnelly v. People*, 52 Am. Dec. 459, note 561. But in New York, an action in the nature of a *quo warranto* must, under the code, be commenced and prosecuted like other civil actions, and is to be governed, in respect to the pleadings and proceedings, by the same rules: *People v. Albany & S. R. R. Co.*, 7 Abb. Pr., N. S., 275; S. C., 55 Barb. 355; S. C., 38 How. Pr. 238; S. C., 1 Lans. 318, citing the principal case. And it is now regarded in that state as a civil action: *People v. Clute*, 52 N. Y. 577, citing the principal case. The title to an office can only be tried in a proceeding in the nature of a *quo warranto*: *Coulter v. Murray*, 15 Abb. Pr., N. S., 135; S. C., 4 Daly, 511, citing the principal case. For a discussion of the nature, effect, and object of *quo warranto*, see *State v. Harris*, 36 Am. Dec. 460; *State v. Evans*, Id. 468; *People v. Rensselaer & S. R. R. Co.*, 30 Id. 33, note 44, where the subject is discussed at length. An action to try the title to an office can only be brought by the attorney general in an action in the name of the people, upon his own information, or upon the complaint of a private party: *Mott v. Connolly*, 50 Barb. 518, citing the principal case.

PERSON MAY BE CONVICTED OF ILLEGAL VOTING notwithstanding any irregularities that may have occurred at the election, such as failing to swear in the election officers, or holding the poles at an improper place, as such irregularities can only be taken advantage of in a direct proceeding: *State v. Cohoon*, 55 Am. Dec. 407. A challenged voter swearing falsely before a *de facto* board of inspectors is as much liable to punishment under the statute as if the oath had been administered by inspectors *de jure*: *Lambert v. People*, 76 N. Y. 231, citing the principal case. An averment in an indictment that the oath was administered by the magistrate in due form of law is sufficient: *Tuttle v. People*, 36 Id. 436, citing the principal case.

CERTIFICATE OF ELECTION IS ONLY PRIMA FACIE EVIDENCE of the election of the party holding it, and does not preclude collateral inquiry into the correctness or legality of the canvass: *People v. Van Cleve*, 53 Am. Dec. 69, note 72; *People v. Thacher*, 7 Lans. 276; S. C., 1 Thomp. & C. 160, citing the principal case.

BOARD OF COUNTY CANVASSERS HAVE NO POWER TO GO BEHIND REGULAR RETURNS from the district inspectors of election. They must act upon

them as regular returns, and leave the parties aggrieved to their remedy through the courts of justice: *Felt's Case*, 11 Abb. Pr., N. S., 207, citing the principal case; see also *People v. Van Cleve*, 53 Am. Dec. 69, note 73. But a court and jury are not confined within such narrow limits, but have power to take evidence *aliunde* the ballot itself for the purpose of elucidating any apparent ambiguity on its face, or any apparent incongruity between it and the surrounding circumstances: *People v. Love*, 63 Barb. 545, citing the principal case. In an action in the nature of a *quo warranto*, the court can go behind the certificates of inspectors and canvassers, and the voter can be examined as a witness to prove for whom he cast his ballot: *People v. Board of Supervisors*, 58 How. Pr. 145, citing the principal case.

ACTS OF OFFICER DE FACTO ARE VALID as respects the public and the rights of third persons, and it is not allowable to assail the title of such officer in a collateral proceeding: *Lambert v. People*, 6 Abb. N. C. 195; *Morgan v. Quackenbush*, 22 Barb. 79; *Thompson v. People*, 6 Hun, 138; *Lambert v. People*, 14 Id. 515; *Supervisors v. Pindar*, 3 Lans. 13; *Pepin v. Lachenmeyer*, 45 N. Y. 32; *Dolan v. People*, 64 Id. 495, all citing the principal case. See also *Bean v. Thompson*, 49 Am. Dec. 154.

ELECTION IS NOT INVALIDATED BY IRREGULARITY on the part of an inspector: *People v. McManus*, 34 Barb. 625; S. C., 22 How. Pr. 27, citing the principal case. Nor by a deviation from the mode of taking a ballot, or the omission to observe some regulation prescribed by the statute: *People v. Supervisors of Kings Co.*, 23 How. Pr. 92, citing the principal case. Omissions and variances which can not work any prejudice are immaterial: *People v. Supervisors of Ulster Co.*, 34 N. Y. 273, citing the principal case. An omission to observe all the formalities is not fatal, where the ultimate object of the statute is accomplished: *People v. Livingston*, 79 Id. 287, citing the principal case.

WHERE JUDGE ASSUMES FACT TO BE PROVED, if a party is dissatisfied with the assumption, he should request to have the question submitted to the jury. If he abstains from making such request, he will be deemed to have acquiesced in the assumption of facts stated by the court: *Mallory v. Tioga R. R. Co.*, 3 Abb. App. Dec. 143; S. C., 36 How. Pr. 204; S. C., 3 Keyes, 356; *Sipperly v. Stewart*, 50 Barb. 67; *People v. White*, 55 Id. 614; *Pollen v. Le Roy*, 10 Bosw. 56; *Bidwell v. Lament*, 17 How. Pr. 361; *Marine Bank v. Clements*, 31 N. Y. 43.

THE PRINCIPAL CASE IS CITED in these cases to the following points: The right of counsel to address the jury is a matter resting in the sound discretion of the court: *Elwell v. Chamberlin*, 31 N. Y. 621. A court of review can not revise or reverse the decision of a judge at the trial in a matter properly resting in his discretion: *Williams v. Sargeant*, 46 Id. 483. The distinction between the effect of a statute that is directory merely and that of one that is mandatory is well recognized: *Rawson v. Van Riper*, 1 Thomp. & C. 375. The time within which a public act is required to be performed is not mandatory but directory, and a literal observance of the direction as to time is not indispensable to the validity of the act: *Matter of New York Elevated R'y Co.*, 7 Hun, 241; *Matter of Kings Co. Elevated R. R. Co.*, 20 Id. 234. The qualification of voters is a proper subject of inquiry with a view to determine upon the abstract right to an office: *People v. Pease*, 30 Barb. 599; S. C., 25 How. Pr. 509. The right to office, as well as the right of life, liberty, and property, is safe under the administration of the ordinary tribunals: *People v. Pease*, 27 N. Y. 61. Fraud can never in a judicial proceeding be predicated of a mere emotion of the mind, disconnected from an act

occasioning an injury to some one: *Masterton v. Beers*, 1 Sweeny, 419. A mere reference by the judge in his charge to what is established by the evidence is not a ground of exception: *Dows v. Rush*, 28 Barb. 180.

MOORE v. MAYOR ETC. OF NEW YORK CITY.

[6 NEW YORK (4 SELDEN), 110.]

DOWER, UNTIL DEATH OF HUSBAND, IS MERELY AN INCHOATE INTEREST. CONDEMNATION OF LANDS TO PUBLIC USE, under right of eminent domain, discharges any inchoate right of dower in the wife of the owner of the fee; and though no separate compensation is made to her, she can not, after her husband's death, recover dower in the lands taken.

APPEAL from a judgment reversing a judgment awarding dower to a widow in lands which had been taken by the city for the site of a market during the husband's life-time.

John S. Mason, for the appellant.

Samuel A. Foot, for the respondents.

By Court, GARDINER, J. The statute under which the corporation of the city of New York makes title to the premises claimed by the plaintiff authorizes the commissioners appointed by the supreme court to make "a just estimate of the damage to the respective owners, lessees, parties, and persons respectively entitled unto or interested in the lands, tenements, and hereditaments proposed to be appropriated to the use of the city:" Laws of 1817, c. 75, sec. 1. A subsequent clause in the same section provides that the report of the commissioners, when confirmed, shall vest the fee simple absolute in the lands so appropriated in the city, and the proceeding are made conclusive upon the corporation, and upon the owners and persons and parties interested in or entitled to such lands, "and all other persons whomsoever." The question is, whether the possibility of dower, accruing to the wife after marriage, but before the death of the husband, is an interest in law, within the purview of the statute. Before assignment of dower, the widow has no estate, but a mere right in action, or claim, which can not be sold upon execution: *Lawrence v. Miller*, 2 N. Y. 254; *Greenleaf's Cru.*, tit. Dower, c. 3, sec. 1, note; *Gooch v. Atkins*, 14 Mass. 378.

If this is the true character of the right of the widow prior to the assignment, that of a wife must be a right to a claim for dower contingent upon her surviving her husband. Such a possibility may be released, but it is not, it is believed, the sub-

ject of grant or assignment, nor is it, in any sense, an interest in real estate. It is not, of itself, property the value of which may be estimated, but an inchoate right, which, on the happening of certain events, may be consummated, so as to entitle the widow to demand and receive a freehold estate in the land, if she survived her husband.

The estate of the widow, after assignment of dower, is a continuation of the estate of her deceased husband: Cru., Dower, T, 6, c. 2, sec. 17. It follows, that, while living, he as owner is entitled to and represents the absolute fee. This the statute vests, on confirmation of the report of the commissioners, and concludes all those entitled to the land, and all other persons whomsoever. Mrs. Moore, at the time of the proceedings to appropriate the real estate, was not, as we have seen, entitled to it, but her husband; and she was concluded by the general language of the act, if the statute was not in contravention of the provision of the constitution of the United States, which prohibits the state from passing any law impairing the obligation of contracts.

Dower is not the result of contract, but a positive institution of the state, founded on reasons of public policy. To entitle to dower, it is true, there must be a marriage, which our law regards in some respects as a civil contract. So the death and seisin of lands by the husband, during coverture, are also necessary to establish a right to this estate; but they are not embraced by nor are they the subjects of the marriage contract. The estate is, by law, made an incident of the marriage relation, and the death and seisin of one of the parties are conditions on which it comes into existence. It stands, like an estate by the curtesy, on the foundation of positive law: 1 Greenleaf's Cru. 166, sec. 6. So the right of the husband to the property of the wife in her possession, by the common law, and her consequent incapacity to hold personal property in her own right, are incidents of the same relation, which the legislature may modify or abolish at pleasure. Gifts made to the wife after the passage of a law to that effect would vest in her, it is presumed, without impairing in any respect the marriage contract. It is because dower is an incident of the marriage relation, established by positive institutions of the country, and not by contract, that the widow is entitled to dower, although the marriage is consummated abroad, where the common law does not obtain: *Ilderton v. Ilderton*, 2 H. Black. 145; *Ruding v. Smith*, 2 Hagg. Con. 376, note. For the same reason, although the husband

can not deprive the wife of dower by alienating the land during coverture, yet he may forfeit it, as for treason, and she will be concluded.

In the case under consideration, the land was taken, against the consent of the husband, by an act of sovereignty, for the public benefit. The only person owning and representing the fee was compensated by being paid its full value. The wife had no interest in the land, and the possibility which she did possess was incapable of being estimated with any degree of accuracy. Under these circumstances, the legislature had the power, which I think they have rightfully exercised, to direct that the value of the entire fee should be paid to the husband of the appellant; and that the corporation, by such payment, in pursuance of the statute, has acquired an indefeasible title to the premises. The judgment of the superior court should be affirmed.

MASON, J. delivered a concurring opinion.

Judgment affirmed.

DOWER OF WIFE IS DEFEATED BY DEDICATION OF LANDS TO PUBLIC USE: *Duncan v. City of Terre Haute*, 85 Ind. 106, citing the principal case. But in *Simar v. Canaday*, 53 N. Y. 304, Folger, J., delivering the opinion of the majority of the court, said: "We think that it must be considered as settled in this state, notwithstanding *Moore v. The Mayor*, and some *dicta* in other cases, that as between a wife and any other than the state, or its delegates or agents exercising the right of eminent domain, an inchoate right of dower in lands is a subsisting and valuable interest, which will be protected and preserved to her, and that she has a right of action to that end.

INCHOATE RIGHT OF DOWER EXISTS NOT AS PART OF MARRIAGE CONTRACT, but as a positive institution of law incident to the marriage relation: *Meliet's Appeal*, 55 Am. Dec. 573; *Doty v. Baker*, 11 Hun, 24, citing the principal case.

UNTIL THERE HAS BEEN ACTUAL ADMEASUREMENT OF DOWER, it is a mere potential interest, amounting to nothing more than a chose in action, and is not subject to seizure and sale by execution at law: *Pennington's Ex'rs v. Yell*, 52 Am. Dec. 262. Before admeasurement of dower the wife has no interest or estate in the lands, and her deed operates, not as a grant, but as an estoppel: *Maloney v. Horan*, 53 Barb. 38; S. C., 36 How. Pr. 267, citing the principal case. The wife has no interest or estate in lands by virtue of her right of dower during the life-time of her husband: *Dibble v. Clapp*, 31 Id. 424; *Hammond v. Pennock*, 61 N. Y. 158; *Bennett v. Harms*, 51 Wis. 258, all citing the principal case. The right of dower before the death of the husband is only an inchoate right, not transmissible to her heirs: *In Matter of Rollwagen*, 48 How. Pr. 113, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Matter of Central Park Extension*, 16 Abb. Pr. 64, to the point that it is the duty of commissioners appointed in proceedings to acquire private property for public purposes to ascertain the real owners by inquiry and examination, and if the evidence produced to them is satisfactory, to award the damages to such owners, even though claims are

presented by other persons; and in *Billings v. Baker*, 28 Barb. 346; S. C., 15 How. Pr. 528, to the point that the legislature had power to modify the existence of prospective tenancy by the curtesy in New York.

KEEGAN v. WESTERN RAILROAD CORPORATION.

[8 NEW YORK (4 SELDEN), 175.]

EMPLOYEE OF RAILROAD COMPANY MAY RECOVER DAMAGES FROM CORPORATION for a personal injury received through defects in the machinery intrusted to him to use (here, through the bursting of the boiler of a locomotive on which he was employed as fireman), upon proof that the corporation had been notified of the weak or defective condition of the machinery, and had failed to repair or replace it.

APPEAL from a judgment for plaintiff in an action for damages. The facts appear in the opinion.

Marcus T. Reynolds, for the appellants.

Nicholas Hill, jun., for the respondent.

By Court, RUGGLES, C. J. This case comes before the court on the report of a referee in the nature of a special verdict, and the question is, whether, upon the facts found, the defendants are liable.

The plaintiff was injured by the explosion of the boiler of a locomotive engine, on which he was employed by the defendants as a fireman. The boiler was defective and dangerous, and its condition in this respect was and had for some time been known to the defendants by the reports of the engineer made on five or six different occasions, which were entered on the books of the defendants kept for that purpose, and the injury to the plaintiff resulted from the improper conduct of the defendants in using the engine in question thus known to be defective. On this statement of facts no doubt can be entertained of the liability of the defendants.

The cases referred to, in which it has been held that a principal is not liable to one agent or servant for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business, are not applicable to the case now under consideration. They are applicable only where the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it did happen. Whenever the injury results from the actual neg-

ligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other. But where the injury results from the actual fault of a competent and careful agent (as may sometimes happen), the fault will not be imputed to the principal when the injury falls upon another servant, as it will where the injury falls on a third person, as, for instance, on a passenger on a railroad. In the case of a passenger, the actual fault of the agent is imputed to the principal on grounds of public policy; in the case of a servant, it is not. The reasons for this distinction may be found in the cases cited by the appellants' counsel; but it is unnecessary to state them here, because the injury in the present case is found to have resulted directly from the negligence or misconduct of the defendants themselves in continuing to use an engine having a defective and dangerous boiler after notice of its dangerous condition.

It was made a point on the argument that the plaintiff knew the condition of the boiler, and therefore took the risk upon himself; but this point is not sustained in point of fact. The referee does not find that the plaintiff knew it to be in a dangerous condition; and this fact, if material, can not be presumed by the court.

Judgment affirmed.

LIABILITY OF MASTER FOR INJURIES RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT: See *Hubgh v. N. O. & O. R. R. Co.*, 54 Am. Dec. 565; *Brown v. Maxwell*, 41 Id. 771, note 773, where other cases are collected. The principal case is cited in *Sherman v. Rochester & S. R. R. Co.*, 17 N. Y. 156, as recognizing the rule that a principal is not liable to one of his agents or servants for injuries sustained through the negligence of another agent or servant, when both are engaged in the same general business; and to the same point in *Columbus, C. & I. C. R'y Co. v. Troesch*, 68 Ill. 550. But the principle that an employer is not liable to his servant for injury sustained by him in consequence of the misfeasance or negligence of his fellow-servant is applicable only where the injury complained of happened without any actual fault or misconduct of the employer, either in the act which caused the injury, or in the selection or employment of the servant by whose fault it happened: *McMillan v. Saratoga & W. R. R. Co.*, 20 Barb. 452; *Smith v. New York & H. R. R. Co.*, 6 Duer, 230; *Cone v. Delaware, L. & W. R. R. Co.*, 15 Hun, 177; *Smith v. New York Central R. R. Co.*, 24 N. Y. 244, all citing the principal case. An employer is responsible to his employee for injuries sustained by the latter from the personal neglect or misfeasance of the former: *Baulec v. New York & H. R. R. Co.*, 12 Abb. Pr., N. S., 316; S. C., 62 Barb. 629; S. C., 5 Lans. 442; *Faulkner v. Erie R'y Co.*, 49 Barb. 327; *Treadwell v. Mayor etc. of N. Y.*, 1 Daly, 128; *Span v. Ely*, 8 Hun, 257; *Ryan v. Fowler*, 24 N. Y. 413; *Wright v. New York Central R. R. Co.*, 25 N. Y. 566; *Leonard v. Collins*, 70 Id. 93; *Anderson v. New Jersey Steamboat Co.*, 7 Robt. 611; *Chicago & N. W. R. R. Co. v. Swett*, 45 Ill. 202; *Indianapolis & C. R. R. Co. v. Love*, 10 Ind. 557; *Gilman v. Eastern R. R. Corp.*, 13 Allen, 442, all citing the prin-

principal case. And a master is bound to use ordinary care in providing structures and engines, and in selecting servants, and is liable for negligence in this regard: *Gilman v. Eastern R. R. Corp.*, 10 Id. 238, citing the principal case.

IN ACTION FOR PERSONAL INJURIES TO PLAINTIFF CAUSED BY DEFECT in the thing instrumental in causing the injury, evidence that the defendant had knowledge of such defect is admissible under a complaint alleging negligence on his part: *Byron v. New York St. P. T. Co.*, 28 Barb. 40; *Loonam v. Brockway*, 28 How. Pr. 474, both citing the principal case.

AGENT OF CORPORATION AUTHORIZED TO EMPLOY OTHERS is not to be regarded simply as a fellow-servant of those whom he employs in the general business: *Wright v. New York Central R. R. Co.*, 28 Barb. 86; *Mitchell v. Robinson*, 80 Ind. 284, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Warner v. Erie R'y Co.*, 39 N. Y. 377, as a case in which the defendant had express and repeated notice of the defectiveness of the engine through which the injury to the plaintiff was occasioned. It is also distinguished in *Loonam v. Brockway*, 3 Robt. 82.

HOWARD INSURANCE COMPANY v. HALSEY.

[8 NEW YORK (4 SELDEN), 271.]

MORTGAGEE IS NOT BOUND TO INQUIRE, BEFORE RELEASING PORTION of the land, whether any portion has been conveyed or incumbered since his lien attached; but will retain the right to have the land sold in the inverse order of alienation, unless, before giving the release, he had actual or constructive notice of such subsequent alienation or incumbrance.

NOTICE WILL NOT BE IMPUTED FROM MERE RECORDING of the subsequent deed, or from the fact that the mortgagee's solicitor in another employment acquired the information.

REFERENCE IN RELEASE OF MORTGAGE, TO INSTRUMENT ON RECORD affecting the land, is constructive notice of the contents of such instrument.

APPEAL from a judgment dismissing a bill which prayed foreclosure of a mortgage against a portion of the mortgaged lands, after a portion had been released. The mortgage was made by Halsey, covering about two hundred and ninety-two acres of land. He afterward conveyed ninety-two acres of the land to Wildes, who had no notice of the mortgage. He afterward assigned the residue to Hunt, in trust for creditors. He subsequently made a large part payment on the mortgage debt, and the mortgagees thereupon released to Hunt the residue of the land which was not embraced in the deed to Wildes; and the assignee subsequently conveyed this residue to Paulding. Wildes meantime had conveyed his ninety-two acres to trustees, etc. The various deeds were recorded. The description of

lands given in the release contained an allusion to the title of Wildes, which is quoted in the opinion. After the above transactions, the mortgagees brought this suit to foreclose the mortgage against the portion of the land not released; but the court below dismissed the bill, on the ground that the plaintiffs, when they gave the release to Hunt, had notice that the lands not embraced in it had been conveyed, and therefore the release operated to exonerate that portion of the land from the mortgage lien.

Samuel A. Foot, for the appellants.

Jeremiah Laroque, for the respondents.

By Court, JOHNSON, J. Upon the conveyance of the ninety-two acres to Wildes, by Halsey, an equity arose in Wildes' favor to have the residue of the mortgaged premises applied, in the first instance, to the payment of the mortgage debt. Subsequently to that conveyance, the mortgagees released from the lien of the mortgage the whole of the residue of the premises which had been conveyed by Halsey to Hunt, and by him to Paulding. This residue, at the time of the release, was of greater value than the amount of the mortgage. Upon these facts, if the case stopped here, it is not denied by the counsel for either party that the appellants would not be deprived of the lien of their mortgage; for the right to have incumbered lands which have been sold in successive parcels applied to the satisfaction of the incumbrance, in the inverse order of their alienation, being only an equity, and not a legal right, the prior incumbrancer is not bound, at his peril, to ascertain whether any of the mortgaged lands have been aliened or subsequently incumbered, when applied to, to release part of the lands bound by his incumbrance. In order to impose upon him the obligation to regard this equity, his conscience must be affected by knowledge of the facts upon which the equity depends, or by notice sufficient to put him upon inquiry: *Stuyvesant v. Hall*, 2 Barb. Ch. 151; *Guion v. Knapp*, 6 Paige, 35 [29 Am. Dec. 741].

It is quite obvious that the existence of this equity does not depend upon the purchase being for a valuable consideration. Looking at the simplest case, that of mortgagor and his grantee of part of the mortgaged premises, plainly, as between them, the ungranted lands are first liable. The introduction of new parties does not alter this equity; they who come in after the first purchase, and under the mortgagor, succeed to his position and

obligations: *Clowes v. Dickenson*, 5 Johns. Ch. 235; *Harbert's Case*, 3 Co. 11.

It is not contended that the appellants had any actual notice or knowledge of the conveyance to Wildes; nor was the recording of the conveyance to Wildes constructive notice to them of its existence: *Stuyvesant v. Hall*, *supra*. The information obtained by Mr. Strong, the solicitor who was retained to foreclose the mortgage in 1842, can not be regarded as effectual, because it was not acquired in reference to the same transaction. Had the solicitor who advised or drew the release received the same information, while that was in preparation, it would have bound the appellants: 2 Sugd. Vend. 456, pl. 16.

We, however, agree with the superior court in the opinion that constructive notice, or at least notice to put the appellants upon inquiry, existed in this case. The release executed by the appellants to Hunt, dated April 30, 1846, after describing the three parcels released, declares the same to be part of the same premises conveyed to William Paulding by said Hunt and wife, by deed dated February 25th, then last past, and to be therein described as parcels 1, 3, and 4. This reference of course makes the deed referred to, and the description of the premises therein contained, as completely notice of its contents to the appellants as if it were recited at length in the deed. Now, in that deed the description of parcel number 1 was as follows: "Beginning at the north-easterly corner thereof, on the south side of the New York and Albany post-road, adjoining land now or late of George Wildes, and running thence southerly in three different courses along said Wildes' land to land of Isaac Lafurgy," etc.

Now, when the mortgage to the appellants was executed the land therein contained was described as a farm consisting of about two hundred and ninety-four acres, and being part of a farm theretofore conveyed by Vanbrugh Livingston to the mortgagor. The appellants, by means of the deed to Paulding, had then this state of facts presented to them: that in a deed by the grantee of their mortgagor of part of the mortgaged premises, another part is described, not as their mortgagor's property, but as now or late the property of George Wildes; and in another part of the same deed it is called the said Wildes' land. We think that this was sufficient to arrest the attention of the appellants, and put them upon inquiry. The property having come from Livingston to Halsey, described only as Livingston's, having been mortgaged by Halsey to them, by a general description, and as having been Livingston's, the fact that a particular

parcel of it is afterwards spoken of as belonging then or lately to another person, would naturally excite surprise and lead to inquiry.

Two objections were urged upon the argument to this conclusion: the one, upon the ground that the description in the mortgage gives no information of the ownership of the land on the east, a blank being left for the name of the owner; the other, because the description of parcel No. 1 in the Paulding deed gives no intimation that Wildes' land was a part of the mortgaged premises. These objections are each founded upon a single erroneous idea, that the appellants could not locate the land described in the release so as to distinguish what part of the premises mortgaged to them was not included in the description of the lands to be released; this they obviously could do, or were bound to be able to do. They therefore knew, or were bound to know, that a strip of land lying west of their eastern boundary was not released, and yet that that strip was described, not as the property of their mortgagor, but of a third person. No matter what was the name of the owner to the east of their eastern boundary, they knew that the land west of that line had been mortgaged to them as Halsey's, and that a description of it as the property of another person could probably be true only on the supposition of a conveyance by Halsey prior to the release they were about to execute. The decree of the superior court must, therefore, be affirmed with costs.

Decree affirmed.

WHERE MORTGAGE APPEARS OF RECORD TO HAVE BEEN SATISFIED, an innocent purchaser will be protected against it; otherwise, however, if he purchase with notice that the satisfaction was entered without the knowledge of the holder of the note secured by the mortgage, and that the debt is in fact unpaid: See *Swartout v. Curtis*, 55 Am. Dec. 345; *Roberts v. Halstead*, 49 Id. 541.

PURCHASERS OF PROPERTY SUBJECT TO MORTGAGE RECORDED IN ANOTHER STATE are not affected thereby, unless they have actual or constructive notice thereof: *McClenney v. McClenney*, 49 Am. Dec. 738, note 742.

RELEASE OF PART OF MORTGAGED TRACT, EFFECT OF: See *Guion v. Knapp*, 29 Am. Dec. 741, note 747, where this subject is discussed, and a large number of cases collected. If several lots are mortgaged and the mortgagee releases some of them, he can not enforce against those not released more than a proportionate amount of the debt, provided the creditor has notice of the change sufficient to put him upon inquiry: *Colgrove v. Tallman*, 67 N. Y. 98, citing the principal case.

WHERE MORTGAGED PREMISES ARE SOLD IN DIFFERENT PARCELS, at different times, to different purchasers, the parcels, on foreclosure, are to be

sold in the inverse order of their alienation: *Chapman v. West*, 17 N. Y. 127; *Barnes v. Mott*, 64 Id. 402, both citing the principal case. See also *Guion v. Knapp*, 29 Am. Dec. 741, note 747, where this subject is discussed.

THE PRINCIPAL CASE IS CITED in *Williamson v. Brown*, 115 N. Y. 364, and in *Hall v. Edwards*, 43 Mich. 475, to the point that where information possessed by a party would, if followed up by proper examination, have led to the discovery of a mortgage or conveyance, the conclusion of law necessarily results that such information amounted to implied notice of such instrument; in *Warner v. Blakeman*, 36 Barb. 517, to the point that the assignee of a mortgage is liable to all the equities of the mortgagor, though he is not affected by mere outside equities residing in third persons, of which he has no notice; and in *Calvo v. Davies*, 73 N. Y. 216, to the point that a mortgagee, in dealing with his security, is bound to observe the equitable rights of third persons, of which he has notice.

BREASTED v. FARMERS' LOAN AND TRUST CO.

[8 NEW YORK (4 SELDEN), 299.]

CONDITION IN LIFE POLICY THAT IT SHALL BE VOID if the insured "shall die by his own hand" requires a voluntary act of self-destruction; and does not take effect on his committing suicide while insane.

APPEAL from judgment in favor of plaintiffs in an action on a policy of life insurance. The defense was that the policy was, by its terms, to be void in case the assured "shall die by his own hand;" and that he committed suicide. The plaintiffs (who were administrators of the insured) showed that he was insane when he did so; and the court sustained the right of action. See 4 Hill, 73, for a decision of the point on demurrer.

William Curtis Noyes, for the appellants.

Samuel Sherwood, for the respondents.

By Court, WILLARD, J. The question raised by the decision of the referees is substantially the same as that decided by the supreme court on the demurrer: 4 Hill, 73. It will be unnecessary, therefore, to give to each a separate examination.

It is material to determine, in the first place, what is meant by the term "death by his own hand," which is to avoid the policy. If the words are construed according to the letter, an accidental death occasioned by the instrumentality of the hand of the insured would fall within the exception. Thus, should the insured by mistake swallow poison, and thereby terminate his life, his representatives could not recover the policy if the poison was conveyed to his mouth by his own hand. The same rule of construction applied to the words "death by the hands

of justice," in the same connection, would take the case out of the exception if the death was occasioned by strangulation by a rope instead of the hands of the minister of justice. But it is too plain for argument that the literal meaning is not the true meaning of either phrase. "Death by the hands of justice" is a well-known phrase, denoting an execution, either public or private, of a person convicted of crime, in any form allowed by law. The moral guilt of the party executed has nothing to do with the definition. Socrates, though he took the poison from his own hand, died by the hands of justice, in this sense of the term; it would be an abuse of language to charge him with an act of intentional self-destruction. The martyrs who perished at the stake in like manner "died by the hands of justice."

In popular language, the term "death by his own hand" means the same as suicide, or *felo de se*; the first two, indeed, are not technical terms, and may be used in a sense excluding the idea of criminality. The connection in which they are used in this policy indicates that the phrase "death by his own hand" meant an act of criminal self-destruction. Provisos declaring the policy to be void in case the assured commit suicide or die by his own hand are used indiscriminately as expressing the same idea. In the note to *Borradaile v. Hunter*, 5 Man. & G. 648, are given the forms of the proviso, and by seventeen of the principal London insurance companies; in eight of them the exception is of a death by suicide, and in nine of a death by the assured's own hands; in two a separate provision is made in case of a death by suicide not *felo de se*, and in two others in case of a death by his own hands not *felo de se*. It is obvious, therefore, that the phrases "death by his own hand" and "death by suicide" mean the same thing; and that both, unless qualified by some other expressions, import a criminal act of self-destruction. The connection in which they stand in this policy favors this construction. The first four exceptions in the policy are of acts innocent in themselves, three of which become inoperative if the defendants give their consent and have it indorsed on the policy; then follow the last four exceptions, viz., if he shall die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any law, etc. By the acknowledged rule of construction, *noscitur a sociis*, the first member of the sentence, if there be any doubt in its meaning, should be controlled by the other members, which are entirely unequivocal, and should be construed to mean a felonious killing

of himself: Broom's Maxims, 293, 450. It is a rule laid down by Lord Bacon that *copulatio verborum indicat acceptationem in eodem sensu*—the coupling of words together shows that they are to be understood in the same sense. And when the meaning of any particular word is doubtful or obscure, or when the expression taken singly is inoperative, the intention of the parties using it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument, for *quæ non valeant singula juncta juvant*: 4 Bacon's Works, 26; *Roberts v. Roberts*, 2 Bulst. 132; Broom's Maxims, 293. Besides, the words in this case are those of the insurer, and if susceptible of two meanings, should be taken strongly against him.

It was not contended on the part of the defendant that the policy would be avoided by a mere accidental destruction of life by the party himself. It was urged that it would be if the act was done intentionally, although under circumstances which would exempt the party from all moral culpability. It was insisted that the expression must be taken to mean a death by his own act. It seems to me that this is a yielding of the whole question. An insane man, incapable of discerning between right and wrong, can form no intention; his acts are not the result of thought or reason, and no more the subject of punishment than those which are produced by accident. The acts of a madman, which are the offspring of the disease, subject him to no criminal responsibility. If the insured, while engaged in his trade as a house-joiner, had accidentally fallen through an opening in the chamber of a house he was constructing and lost his life, the argument concedes that the insurer would have been liable; the reason is, that the mind did not concur with act. How can this differ in principle from a death in a fit of insanity, when the party had no mind to concur in or oppose the act.

It must occur to every prudent man, seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases which may terminate his being. It is said the defendants did not insure the continuance of the intestate's reason; nor did they, in terms, insure him against the small-pox or scarlet-fever, but had he died of either disease, no doubt the defendants would have been liable. They insured the continuance of his life; what difference can it make to them or to him whether it is terminated by the ordinary course of a disease in his bed, or whether in a fit of delirium he ends it himself? In each case the death is occasioned by means within the meaning

of the policy, if the exception contemplates, as I think it does, the destruction of life by the intestate while a rational agent, responsible for his acts.

It is competent, no doubt, for the insurer so to frame his policy as to exempt him from liability for a death occasioned in a fit of insanity. The parties have not done so in the present case.

It is urged that because a person *non compos mentis* is liable *civiliter* for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception in the policy. That conclusion is not a legitimate deduction from the premises. A rational man is liable *civiliter* for an injury occasioned by an accident, unless it be an inevitable one; and yet no one pretends that the insurer is not liable for a death by accident, whether inevitable or not; indeed, the liability for death by accident was conceded on the argument. A death by accident and a death by the party's own hand when deprived of reason stand on principle in the same category; in both cases the act is done without a controlling mind; if the insurer is liable in the one case, he should be in the other.

If the insured was compelled by duress to take his own life, it will hardly be contended that the insurer could avoid payment. In what consists the difference between the duress of man and the duress of heaven? Can a man be said to do an act prejudicial to the insured when he is compelled to do it by irresistible coercion? and can it make any difference whether this coercion come from the hand of man or the visitation of providence?

But it is urged that this is a civil action, and the contract of insurance a civil contract: be it so. A person so destitute of reason as not to know the consequences of his acts can make no valid contract. Whether the incompetency be the result of disease or of intoxication, his contracts made while in that condition are void: *Barrett v. Buxton*, 2 Aik. 167 [16 Am. Dec. 691], approved by Chancellor Walworth in *Prentice v. Ackom*, 2 Paige, 81, and by Chancellor Kent, in 2 Kent's Com. 451; Smith's Law of Cont. 329, 333, and notes. If the party could do no act to bind himself, he certainly could do none to discharge the insurer; if he could not make a bond, he could not make a release; if he could not make a will, he could not revoke one.

The liability of a lunatic for necessaries rests upon the ground that the law will raise a contract by implication, on the part of the lunatic, in favor of the party who has supplied them in good

faith, and therefore does not affect the present question: *Wentworth v. Tubbs*, 1 You. & Col. N. C. 171. The cases on this head are analogous to that of an infant. See Smith's Law of Cont. 325 et seq., and notes, where the cases are collected and reviewed. The law, to prevent a failure of justice, will imply a promise by a party incapable of making a contract; but it will never imply that a party incapable of distinguishing between right and wrong was guilty of a fraud.

At the time this case was decided by the supreme court on the demurrer there had been no case, either in this country or in England, in which the same question had arisen. The case of *Borradaile v. Hunter*, 5 Man. & G. 639, decided by the English common pleas in 1843, has since been reported. That action was brought by the executor of the insured upon a life policy containing a proviso that in case the assured should die by his own hands, or by the hands of justice, or in consequence of a duel, the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue whether the assured died by his own hands, the jury found that he voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was held by a majority of the court, Tindal, C. J., dissenting, that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. The three judges who formed the majority laid the main stress upon the fact that the jury found the act of self-destruction to be voluntary, that he knew when he threw himself into the river he should thereby destroy his life, and that he intended thereby to do so. The referees in the present case have not found that the intestate acted voluntarily, or that he knew the consequence of his act; they merely find that, while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If *Borradaile v. Hunter*, *supra*, be an authority which we ought to follow, it differs so much from the case before us that we are at liberty to decide it upon principle.

After the case of *Borradaile v. Hunter*, *supra*, the case of *Schwabe v. Clift*, 2 Car. & Kir. 134, was tried at *nisi prius* before Cresswell, J. It was upon a policy upon the life of the plaintiff's intestate, containing the proviso that if the assured should

“commit suicide, or die by dueling or by the hands of justice, the policy should be void.” The assured died from the effects of sulphuric acid taken by himself, but evidence was given tending to show that at the time he took the sulphuric acid he was in part of unsound mind. In his charge to the jury, the learned judge said that to bring the case within the exception, it must be made to appear that the deceased died by his own voluntary act; that at the time he committed that act he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing; and that therefore he was at that time a responsible being. The jury found for the plaintiff. This cause was afterwards brought into the court of exchequer chamber on bill of exceptions, and will be found in 3 Com. B. 437, by the title of *Clift v. Schwabe*. The court, by a vote of four to two, ordered a new trial, holding that the direction was erroneous; for that the terms of the condition included all acts of voluntary self-destruction, and therefore, if A. voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent. This case is open to the same remark as *Borradaile v. Hunter, supra*; it turned upon the assumed fact that the act of suicide was voluntary, a fact not found by the referees in this case.

RUGGLES, C. J., and MORSE, MASON, and TAGGART, JJ., concurred.

GARDINER, J., delivered a dissenting opinion.

JEWETT and JOHNSON, JJ., also dissented.

Judgment affirmed.

SUICIDE OF ASSURED, EFFECT OF, ON RIGHT TO RECOVER ON LIFE INSURANCE POLICY.—The solution of the question as to whether or not there can be a recovery on a life insurance policy where the assured has taken his own life, of course depends, to a considerable extent, upon the terms of the policy.

IF POLICY CONTAINS NO CONDITION AGAINST SELF-DESTRUCTION BY ASSURED, it is clear, upon principle, that a voluntary suicide, the assured being sane at the time, is a fraud upon the insurer, and vitiates the insurance. Indeed, aside from the fraud involved in the transaction, public policy would forbid a recovery in such a case, since a contrary doctrine would offer direct encouragement to suicide: Bunyon on Life Ass., 2d ed., 71; Bliss on Life Ins., secs. 247, 248; *Moore v. Woolsey*, 4 El. & Bl. 243; S. C., 24 L. J. Q. B. 40; 1 Jur., N. S., 468; 28 Eng. L. & Eq. 248; 3 Big. Life & Acc. Ins. Cas. 138; *Hartman v. Keystone Ins. Co.*, 21 Pa. St. 466; S. C., 1 Big. Life & Acc. Ins. Cas. 649; *Supreme Commandery Knights Golden Rule v. Ainsworth*, 71 Ala. 436; S. C., 46 Am. Rep. 335, 337. Even a stipulation to the effect that a voluntary suicide by the assured while sane should not avoid the policy as respects the assured and his representatives would be invalid: Bunyon on

Life Ass., 2d ed., 72. Says Lord Chief Justice Campbell, in *Moore v. Woolsey*, *supra*: "If a man insures his life for a year, and commits suicide within the year, his executors can not recover on the policy, as the owner of a ship, who insures her for a year, can not recover upon the policy if within the year he causes her to be sunk. A stipulation that in either case, upon such an event, the policy should give a right of action, would be void." It has been held, however, that where a policy is taken out on the life of a husband for the benefit of his wife and children, and he afterwards commits suicide, the policy is not vitiated as against them, there being no condition therein for a forfeiture in case of suicide, because the beneficiaries are not bound by the husband's acts after the insurance was effected: *Fitch v. American Popular Ins. Co.*, 59 N. Y. 557; *Patrick v. Excelsior Life Ins. Co.*, 67 Barb. 202; S. C., 4 Hun, 263. Upon a similar principle to that which would forfeit a policy for a felonious suicide without an express condition to that effect, a death caused by an abortion voluntarily procured by the assured, without sufficient medical cause, to be committed upon her, will vitiate the contract on the ground of public policy: *Hatch v. Mutual Life Ins. Co.*, 2 Rep. 362 (Mass.). Certainly, where there is no provision in the policy for forfeiture by suicide, self-destruction committed by the assured while insane can not vitiate the contract: *Horn v. Anglo-Australian etc. Ins. Co.*, 30 L. J. Ch. 511; S. C., 4 L. T., N. S., 142; 7 Jur., N. S., 673; 2 Big. Life & Acc. Ins. Cas. 602. In that case Vice-Chancellor Wood, in the course of his opinion, said: "There is no principle of public policy which calls upon the court to say that a person who commits no offense, but who is only subject to that which is really just as much an accident as if he had fallen from the top of a house, is to forfeit his insurance on the ground of public policy."

WHERE POLICY PROVIDES FOR FORFEITURE BY SELF-DESTRUCTION, there is an irreconcilable conflict of authority upon the point as to whether or not voluntary self-destruction induced by insanity is to be regarded as within the condition, and if not, as to what kind and degree of insanity will prevent the forfeiture: May on Ins., sec. 308; Bliss on Life Ins., sec. 228; Reynolds on Life Ins. 105, 107. In view of this conflict, some courts decline to lay down any general rule upon the subject, contenting themselves with deciding as to the effect of the insanity in the particular cases before them: *Hathaway v. National Life Ins. Co.*, 48 Vt. 335. In that case, Pierpont, C. J., declared that none of the decisions successfully laid down the line of demarkation between those cases in which the insanity would prevent the forfeiture and those in which it would not. Before attempting to state the doctrine of the different classes of cases on this subject, some preliminary observations will not be amiss.

1. *Such Provision should be Strictly Construed against Insurance Company*: 11 Alb. L. J. 374; *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41. This principle is not always regarded in the adjudged cases, but its soundness seems to us unquestionable. As was well stated in a brief editorial note in 11 Alb. L. J. 374, a strict construction should be adopted in such cases: 1. Because such a provision is in the nature of a penalty or forfeiture; and 2. Because the language of the policy is chosen by the company, and it is its own fault if it is not strong enough in its favor. It must be presumed to have expressly provided in plain terms for every ground upon which it intends to claim a forfeiture, and every doubt is to be resolved against it.

2. *Meaning of Terms "Commit Suicide," "Die by Suicide," and "Die by his Own Hand," etc.*, in a provision for forfeiture in a life insurance policy, is the same, as a general rule: Bliss on Life Ins., sec. 228; *Dufaur v. Professional*

Life Ass. Co., 25 Beav. 599; S. C., 4 Jur., N. S., 841; 27 L. J. Ch. 817; *Oliff v. Schwabe*, 3 Com. B. 437; S. C., 2 Big. Life & Acc. Ins. Cas. 312; *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; S. C., 6 Ins. L. J. 268; 15 Alb. L. J. 11; *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580; S. C., 7 Alb. L. J. 310; 2 Ins. L. J. 577; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; S. C., 16 Rep. 705; *Eastabrook v. Union Mutual Ins. Co.*, 54 Me. 226; S. C., 1 Big. Life & Acc. Ins. Cas. 139; *Connecticut Mutual Life Ins. Co. v. Groom*, 86 Pa. St. 92; S. C., 27 Am. Rep. 689; 17 Alb. L. J. 418; *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Ins. L. J. 444; S. C., 4 Big. Life & Acc. Ins. Cas. 138; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; S. C., 19 Am. Rep. 623. The meaning of such terms varies, however, according to the view taken by the particular court of the question as to whether self-killing by an insane person is within such a condition.

3. *Accidental or Unintentional Self-killing is not within Condition* forfeiting a policy for suicide or taking one's own life, whether such death result from taking poison by mistake, supposing it a wholesome medicine, or taking an overdose of a dangerous medicine, or from an act done in frenzy or delirium, as by leaping from a window, tearing off a bandage from an artery, or from an act done under the stress of an overpowering force. In this all the authorities agree, whatever may be the opinion of particular courts as to whether or not a voluntary self-destruction resulting from insanity is within the condition: May on Ins., sec. 307; *Dean v. American Mut. Life Ins. Co.*, 4 Allen, 102; S. C., 1 Big. Life & Acc. Ins. Cas. 195; *Cooper v. Massachusetts etc. Ins. Co.*, 102 Mass. 227; *Pollock v. United States Accident Ass.*, 12 Week. Not. Cas. 251; S. C., 26 Alb. L. J. 464; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; S. C., 7 Chic. L. N. 421; 4 Ins. L. J. 569; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317; S. C., 39 Am. Rep. 660; 12 N. Y. Week. Dig. 344. So even where the mistake was due to the fault or negligence of the assured, as where, owing to drunkenness, he took poison by mistake without intent to destroy his life: *Equitable Life Ass. Soc. v. Paterson*, 41 Ga. 338; S. C., 5 Am. Rep. 535; 3 Big. Life & Acc. Ins. Cas. 534. The self-destruction must be a voluntary act, knowingly done to work a forfeiture: *Stormont v. Waterloo etc. Ass. Co.*, 1 Fost. & F. 22; S. C., 3 Big. Life & Acc. Ins. Cas. 196; *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Ins. L. J. 444; S. C., 4 Big. Life & Acc. Ins. Cas. 138; *St. Louis Mut. Life Ins. Co. v. Graves*, 6 Bush, 268; S. C., 1 Big. Life & Acc. Ins. Cas. 736. Thus where the deceased was found insensible, suspended by the foot over a banister, it was held that in order to defeat a recovery under such a provision it must appear that he voluntarily threw himself over: *Stormont v. Waterloo etc. Ass. Co.*, *supra*.

4. *Rule in England as to Self-destruction by Insane Person*, under a policy conditioned if the assured "die by his own hand," or the like, was laid down in *Borradaile v. Hunter*, 5 Man. & G. 639; S. C., 5 Scott N. R. 418; 7 Jur. 443; 12 L. J. C. P. 225; 2 Big. Life & Acc. Ins. Cas. 280, referred to in the principal case. That rule is, in substance, that if, when the suicidal act was done, the deceased knew that his life would be thereby destroyed, and intended it to be so, the policy is vitiated under the condition, even though the insured was insane at the time, and incapable of distinguishing as to the right or wrong, or moral character and consequences, of the act he was doing, that is to say, although the act was not felonious, the moral condition of the mind of the assured being wholly immaterial. This rule has never been departed from in the English courts: *Dorman v. Borradaile*, 5 Man. G. & S. 380; *Dufaur v. Professional Life Ass. Co.*, 25 Beav. 99; S. C., 4 Jur., N. S.,

841; 27 L. J. Ch. 817; *White v. British Empire etc. Ass. Co.*, L. R., 7 Eq., 894; S. C., 19 L. T., N. S., 308; 38 L. J. Ch. 53. But in *Schwabe v. Clift*, 2 Car. & Kir. 134; S. C., 3 Man. G. & S. 436; 17 L. J. C. P. 2, it was held, distinguishing *Borradaile v. Hunter*, *supra*, that where the condition was that the policy should be forfeited if the assured should "commit suicide," it meant something more than merely "dying by his own hand;" and that, in order to avoid the policy, there must be a felonious self-destruction, and that if, through insanity, the insured was at the time incapable of distinguishing between right and wrong, and of appreciating the nature and quality of the act he was doing, the insurer was liable. This decision was, however, reversed in the exchequer chamber, and the case was held to be governed by the rule in *Borradaile v. Hunter*, *supra*, there being no substantial distinction in such a case between "suicide" and "dying by one's own hand:" *Clift v. Schwabe*, 3 Com. B. 437; S. C., 2 Big. Life & Acc. Ins. Cas. 312.

5. *Rule of American Cases as to Effect of Insanity under Such Condition.* The earliest reported American decision on this subject is the principal case, as first given in 4 Hill, 73: *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; S. C., 16 Rep. 705. The doctrine laid down in this case in the court of appeals, and in the prior decision in the supreme court, may be said also to be now the prevailing one in this country, at least in substance, although it seems to have been in part denied, or at least modified, by subsequent adjudications in New York, as will be presently shown. It must be admitted, however, that the American cases are not at all harmonious on this point. In Massachusetts it was established in *Dean v. American Mutual Life Ins. Co.*, 4 Allen, 101, in accordance with the doctrine of *Borradaile v. Hunter*, *supra*, that a condition in a life policy for its forfeiture if the assured should "die by his own hand" meant simply a self-destruction by a voluntary and intentional act, the moral nature of the act not affecting the hazard, and that if the deceased understood the physical nature and consequences of the act he was about to do, and intended to destroy his life, the policy was forfeited, though he was insane at the time. Said Mr. Chief Justice Bigelow in that case: "A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premeditation, to understand and contemplate the nature and consequences of his own conduct, and to intend the result which his acts are calculated to produce." The doctrine of this case was reaffirmed and the principal case disapproved in *Cooper v. Massachusetts Mutual Life Ins. Co.*, 102 Mass. 227; S. C., 1 Big. Life & Acc. Ins. Cas. 758, where it was held, in an action on a policy so conditioned, where the deceased had taken his own life, that evidence was inadmissible to show that he was insane at the time, that he acted under the impulse of insanity, and that his act was the direct result of his insanity, there being "no offer to prove madness or delirium, or that the act of self-destruction was not the result of the will and intention of the party adapting the means to the end, and contemplating the physical nature and effects of the act." The same doctrine in substance was laid down in *Nimick v. Mutual Benefit Life Ins. Co.*, 3 Brews. 502; S. C., 3 Pittsb. Rep. 293; 1 Big. Life & Acc. Ins. Cas. 689, in the United States circuit court for the western district of Pennsylvania; and in *Gay v. Union Mut. Life Ins. Co.*, 9 Blatchf. 142; S. C., 2 Big. Life & Acc. Ins. Cas. 4. In the latter case, Woodruff, J., in his charge to the jury, stated that "if the assured was conscious of the act he was committing, intended to take his own life, and was capable of understanding the nature and consequences of the act, the defendants are not liable; and if the

act was thus committed, it is immaterial whether he was capable of understanding its moral aspects, or of distinguishing between right and wrong. If, on the other hand, he was not thus conscious, or had no such capacity, but acted under an insane delusion overpowering his understanding and will, or was impelled by an uncontrollable impulse which neither understanding nor will could resist, then the defendants are liable, and your verdict must be for the plaintiff." The two cases last cited must be deemed overruled, however, by subsequent decisions of the United States supreme court hereinafter referred to.

In *American Life Ins. Co. v. Isett*, 74 Pa. St. 176; S. C., 2 Ina. L. J. 825; 4 Big. Life & Acc. Ins. Cas. 422, which was an action on a policy containing a similar condition, the court approved an instruction to the jury to the effect that the question was whether the deceased at the time of his self-destruction "was conscious of the act he was committing, and then intended to take his life, and had sufficient mental capacity to comprehend the nature and consequences of his act; if so, then the defendants are not liable. If, on the other hand, he was not thus conscious, but acted under an insane impulse or delusion, sufficient to impair his understanding or will, or if his reasoning power was so far overthrown by his mental condition that he was incapable of exercising his judgment in regard to the consequences, then the defendants are liable." This decision, also, if it means that the inquiry, in such a case, is only as to the deceased's perception and understanding of the physical nature and consequences of the act, and not as to its moral character, must be regarded as overruled by *Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92; S. C., 27 Am. Rep. 689; 6 Rep. 376.

The doctrine of the principal case, on the other hand, is supported by the powerful authority of the supreme court of the United States. In *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580; S. C., 7 Alb. L. J. 310; 3 Big. Life & Acc. Ins. Cas. 819; 2 Ina. L. J. 540, 577, affirming S. C., 1 Dill. 403, the whole subject was elaborately considered in an exhaustive opinion by Mr. Justice Hunt, reviewing all the cases and approving *Breasted v. Farmers' etc. Co.*, and the following conclusion was reached: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of this act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." This doctrine is approved and followed in express terms or in substance in *Charter Oak Life Ins. Co. v. Rodel*, 95 U. S. 232; S. C., 7 Ins. L. J. 284; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; S. C., 16 Rep. 705; *Waters v. Connecticut Mut. Life Ins. Co.*, 2 Fed. Rep. 892 (U. S. C. C., Dist. of N. J.); S. C., 9 Ins. L. J. 337; *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Id. 444 (U. S. C. C., Eastern Dist. of Mich.); S. C., 4 Big. Life & Acc. Ins. Cas. 138; *Hiatt v. Mutual Life Ins. Co.*, 2 Dill. 572; *Coverston v. Connecticut Mut. Life Ins. Co.*, 4 Big. Life & Acc. Ins. Cas. 169, per Dillon, J.; *Jarvis v. Connecticut Mut. Life Ins. Co.*, 5 Ina. L. J. 507; S. C., 6 Id. 311 (U. S. C. C., Northern Dist. of Ill.); *Merritt v. Cotton States Life Ins. Co.*, 55 Ga. 103; S. C., 59 Id. 564; *Life Association of America v. Waller*, 57 Id. 533;

Phillips v. Louisiana etc. Ins. Co., 26 La. Ann. 404; S. C., 21 Am. Rep. 549; *John Hancock Mutual Life Ins. Co. v. Moore*, 34 Mich. 41; *Scheffer v. National Life Ins. Co.*, 25 Minn. 534; S. C., 8 Ins. L. J. 337; *Connecticut Mut. Life Ins. Co. v. Groom*, 86 Pa. St. 92; S. C., 27 Am. Rep. 689; 6 Rep. 376; 7 Ins. L. J. 597; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; S. C., 19 Am. Rep. 623; *Hathaway v. National Life Ins. Co.*, 48 Vt. 335. The same doctrine, in substance, is laid down in *Eastabrook v. Union Mut. Life Ins. Co.*, 54 Me. 224, approving the principal case. The effect of this doctrine is, that in order to work a forfeiture under such a policy on the ground of self-destruction, the assured must have had sufficient mental capacity not only to understand that the act will destroy his life, but also to distinguish its moral quality and consequences, the right and wrong of it, and must perform the act, not under any uncontrollable impulse resulting from insanity, but voluntarily, with the intent to end his life. In other words, it must be a criminal act, an act done with an evil motive: *Merritt v. Cotton States Life Ins. Co.*; *Life Association of America v. Waller*; *Eastabrook v. Union Mut. Life Ins. Co.*; *John Hancock Mut. Life Ins. Co. v. Moore*; *Scheffer v. National Life Ins. Co.*; *Connecticut Mut. Life Ins. Co. v. Groom*; *Phadenhauer v. Germania Life Ins. Co.*, *supra*. The following instruction, based upon and explaining the doctrine of *Mutual Life Ins. Co. v. Terry*, *supra*, was approved in *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121; S. C., 16 Rep. 705: "Had he [the insured], in view of his misfortunes, and of the probable future that awaited him, deliberately come to the conclusion that it was better to die than to live, and did he, in that view, commit suicide? or was he so far mentally unsound that he could not exercise a rational judgment upon the question of life and death? Did he become oblivious to the duties which he owed to his family, to his friends, and to himself? Was he impelled by a morbid impulse which he had not sufficient strength of will to resist, and acting under the influence of this insane impulse, did he determine to take his own life? Because if his reasoning faculties were so far impaired that he could not fairly estimate the moral consequences, the moral complexion of the act, even though he could reason sufficiently well to prepare with great deliberation, and to execute his design with success, nevertheless, within the authority which I have read, he was so far insane that the plaintiff is entitled to recover on this policy." Says Pierpoint, C. J., in *Hathaway v. National Life Ins. Co.*, 48 Vt. 335, commenting on *Mutual Life Ins. Co. v. Terry*, *supra*: "Insane persons may form plans and execute them, and manifest great shrewdness and mental activity, both in forming and executing them. Insanity does not destroy the intellect—it perverts it, and often renders it more active than when it is in its normal condition. But it is not a sound and healthy mind that is operating, but an unsound and diseased one. It does not follow, because we can see that an insane man knows that if he blows his brains out it will kill him, and that he does that act for that purpose, that therefore the act was that of a sane mind voluntarily and deliberately done."

The rule laid down in *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580; S. C., 7 Alb. L. J. 310; 2 Ins. L. J. 540; 3 Big. Life & Acc. Ins. Cas. 819, has not, however, in its full scope, met with universal acceptance in the courts of this country. In an ably reasoned case in New York it was held that upon a policy conditioned to be void if the assured should "die by his own hand," there could be no recovery if the assured voluntarily and intentionally took his own life, even though he was so far mentally unsound as to be incapable of distinguishing the moral quality of the act: *Van Zandt v. Mutual Benefit Life*

Ins. Co., 55 N. Y. 169; S. C., 14 Am. Rep. 215; 3 Ins. L. J. 208; 4 Big. Life & Acc. Ins. Cas. 313. The court thus adopted the doctrine laid down in the English cases, holding it not overruled by the principal case, the observations of Willard, J., to the effect that if the assured was, by reason of insanity, incapable of discerning the moral quality of the act at the time of the self-destruction the condition was not broken, being regarded as mere *dicta*. Mr. Justice Rapallo, who delivered the opinion, said: "The whole reasoning of the opinion of Willard, J., which prevailed over the dissent of Gardiner, Jewett, and Johnson, JJ., shows that he regarded the point raised upon the demurrer, viz., that the assured at the time of destroying his own life was of unsound mind and wholly unconscious of the act, and that presented by the finding as identical, and that the learned judge regarded the finding as establishing that the insured was so insane as not to be capable of forming an intention, and that he had not sufficient mind to concur in the act. The learned judge does not undertake to overrule the cases of *Borradaile v. Hunter* and *Clift v. Schwabe*, but expressly distinguishes those cases from the one before him by pointing out that they assume that the act was voluntary, which fact he holds that the finding in the case of *Breasted* failed to establish." His honor afterwards criticises the opinion expressed by Willard, J., "that a man so insane as to be incapable of discerning between right and wrong can form no intention," and says: "In the practical administration of justice in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether from disease his mind had ceased to control his actions. Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly diseased on the subject of suicide that he can not appreciate its moral wrong, and in this condition of mind he takes his own life, voluntarily and intentionally, perhaps with the very object of securing to his family the benefits of an insurance upon his life, it is difficult to say that this is not a death by his own hand within the meaning of the policy." The learned judge also criticises the opinion of Hunt, J., in *Mutual Life Ins. Co. v. Terry*, 15 Wall. 580, and declares that the question of the capacity of the deceased to appreciate the moral character of the act was not involved in that case, and that all that was said upon that point was *obiter*. After quoting the rule laid down by Mr. Justice Hunt, the learned judge further says: "The precise effect of this passage is not very clear to us, as it includes several conditions which can hardly co-exist. It can be conceived that the act might have been voluntary and the self-destruction intentional, though the assured failed to appreciate its moral character; but it is difficult to conceive how the act could have been voluntary and intentional when the faculties of the deceased were so impaired that he was not able to understand the general nature, consequences, and effect of the act he was about to commit, or when he was impelled thereto by an insane impulse which he had not the power to resist."

This criticism of the opinion in *Mutual Life Ins. Co. v. Terry*, *supra*, as well as of that in the principal case, is approved in *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27; S. C., 35 Am. Rep. 410; 9 Ins. L. J. 17; 20 Alb. L. J. 491. In *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Ins. L. J. 444, Mr. Jus-

tice Longyear repels the criticism of the rule laid down in *Mutual Life Ins. Co. v. Terry*, *supra*, and shows that the words "general nature, consequences, and effect of the act," as used in that rule, have reference to the entire accomplished fact of suicide, and not merely to the physical act of self-destruction. The doctrine of *Van Zandt v. Mutual Benefit Life Ins. Co.*, *supra*, is approved in *Weed v. Mutual Benefit Life Ins. Co.*, 70 N. Y. 561; S. C., 7 Ins. L. J. 33. In other cases in New York it is held, also citing *Van Zandt v. Mutual Benefit Life Ins. Co.*, *supra*, that the words, "die by his own hand," in a life policy have reference to "an intelligent, voluntary act, and not to a suicide committed by a party in a state of mental derangement so great that the act of self-destruction is to be regarded as wholly involuntary:" *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 235; S. C., 8 Alb. L. J. 10; and that though the deceased at the time of the act was aware that it would destroy his life, and was also capable of discerning the moral element involved in the act, yet if he was driven to it by an insane impulse, produced by mental disease, which disabled him from governing his own conduct in accordance with reason, the act was not voluntary, and the condition of the policy was not broken: *Newton v. Mutual Benefit Life Ins. Co.*, 76 N. Y. 426; S. C., 8 Rep. 505; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 321; S. C., 12 N. Y. Week. Dig. 344. There is nothing in this, however, inconsistent with what is laid down in *Mutual Life Ins. Co. v. Terry*, *supra*; on the contrary, it is in exact accord with the doctrine of that decision. So in *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; S. C., 7 Chic. L. N. 421; 4 Ins. L. J. 569, while the court decline to give any opinion as to what would be the effect of insanity depriving the assured of the capacity to distinguish the moral character of the act of self-destruction, where it was done voluntarily, with full knowledge that it would produce death, it is held that if the deceased killed himself "in a fit of insanity which overpowered his consciousness, reason, and will, and thus acted from a mere blind and uncontrollable impulse," or being urged on to the act "by an insane impulse which he could not resist," the policy is not vitiated. This doctrine, of course, is also in strict accord with *Mutual Life Ins. Co. v. Terry*, *supra*, as well as with the New York decisions.

In *St. Louis Mut. Ins. Co. v. Graves*, 6 Bush, 268; S. C., 1 Big. Life & Acc. Ins. Cas. 736, the judges were evenly divided upon the point as to whether or not insanity depriving the assured of the capacity to discern the moral quality of an act of self-destruction would prevent the vitiation of the policy under a condition providing for forfeiture if he should "die by his own hand;" but it was agreed by all that the act of self-destruction must be voluntary, and done with a knowledge that it would destroy life, in order to vitiate the policy.

The doctrine of *Mutual Life Ins. Co. v. Terry*, *supra*, supported as it is by a great preponderance of authority, must be conceded to be the prevailing American doctrine. It certainly seems to us to be the safer, more reasonable, and more consistent doctrine. It accords with the general rule as to the excusatory effect of insanity in civil as well as in criminal cases. It also operates to prevent forfeiture, which is a favorite principle of an enlightened jurisprudence. Nor can it have any injurious effect, since insurers, who always frame such contracts to suit themselves, may if they choose insert express stipulations to the effect that insanity shall not in any case prevent an avoidance by suicide of the assured. If they prefer, for the purpose of getting custom, to omit such stipulations, and to leave the matter in doubt, the doubt ought to be resolved against them. If the assured is to take the

sole risk of his becoming insane and destroying his life, let him have notice of the fact by having it clearly "nominated in the bond." As has been well said in some of the cases above referred to, insanity is as much a disease as fever or consumption; and upon principle, there is no more reason why an insurance of one's life should not be an insurance against death from the former disease than against death from the latter, if there is nothing to the contrary in the policy.

5. *Condition against Suicide, "Sane or Insane," etc.*—A condition or provision in a policy of life insurance avoiding it if the assured shall "die by suicide, felonious or otherwise, sane or insane," is no doubt valid: *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; S. C., 3 Ins. L. J. 422; 4 Big. Life & Acc. Ins. Cas. 498; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; S. C., 7 Am. Rep. 410; 2 Ins. L. J. 839; though such a form of expression is said in the case last cited not to be "happily chosen." So a condition avoiding the policy if the assured "die by suicide, sane or insane," is valid: *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; S. C., 6 Ins. L. J. 268; 15 Alb. L. J. 11. So a condition for avoidance if the assured "die by his own hand, sane or insane:" *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232; *Supreme Commandery Knights Golden Rule v. Ainsworth*, 71 Ala. 436; S. C., 46 Am. Rep. 332; or if he "die by his own act or hand, whether sane or insane:" *Snyder v. Mutual Life Ins. Co.*, 3 Ins. L. J. 579; S. C., 4 Big. Life & Acc. Ins. Cas. 424; or if he "die by his own act and intention, sane or insane:" *Chapman v. Republic Life Ins. Co.*, 6 Biss. 238; S. C., 4 Ins. L. J. 511; *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27; S. C., 35 Am. Rep. 410; 20 Alb. L. J. 491; 9 Rep. 147; 9 Ins. L. J. 17. Such a condition expressed in any of these forms covers any case of voluntary self-destruction, and no kind or degree of insanity will prevent the avoidance: *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284; S. C., 6 Ins. L. J. 268; 15 Alb. L. J. 11; *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; S. C., 3 Ins. L. J. 422; 4 Big. Life & Acc. Ins. Cas. 498; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; S. C., 7 Am. Rep. 410; 2 Ins. L. J. 839; *De Gogorza v. Knickerbocker Life Ins. Co.*, 65 N. Y. 232. And in such a case an averment in the replication to a defense of suicide, that the assured was at the time of "unsound mind, and wholly unconscious of the act," was held to refer only to the nature of the act as a crime, and to be demurrable: *Bigelow v. Berkshire Life Ins. Co.*, *supra*. And where the words of the condition are, "die by his own act and intention, sane or insane," the word "intention" does not qualify it in any way, and does not prevent a suicide while insane from avoiding the policy: *Chapman v. Republic Life Ins. Co.*, 6 Biss. 238; S. C., 4 Ins. L. J. 511; *Adkins v. Columbia Life Ins. Co.*, 70 Mo. 27; S. C., 35 Am. Rep. 410; 20 Alb. L. J. 491; 9 Rep. 147; 9 Ins. L. J. 17. So, though the insured, by reason of insanity, was "wholly incapable of exercising any intention in reference to the act which caused his death," and was impelled thereto, "without any volition of his own, by an insane impulse which his mental and physical faculties were unable to resist:" *Chapman v. Republic Life Ins. Co.*, *supra*. But a death by accident inflicted by one's own hand, by taking poison by mistake or the like, or by an act done in frenzy or delirium, without any sane or insane purpose to cause death, is not within a condition against death "by suicide, voluntary or otherwise, sane or insane:" *Pierce v. Travelers' Ins. Co.*, 34 Wis. 389; S. C., 3 Ins. L. J. 422; 4 Big. Life & Acc. Ins. Cas. 498; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; S. C., 7 Am. Rep. 410; 2 Ins. L. J. 839. So though such accidental death was due to the assured's own negligence: *Pierce v. Travelers' Ins. Co.*, *supra*. So under a condition avoiding a life policy if the assured "shall die by suicide,

whether the act be voluntary or involuntary," or "die by his own hand or act, voluntary or otherwise," an accidental death by taking poison by mistake has been held not to be within the condition so as to prevent a recovery: *Edwards v. Travelers' Life Ins. Co.*, 20 Fed. Rep. 661; *Penfold v. Universal Life Ins. Co.*, 85 N. Y. 317; S. C., 39 Am. Rep. 660; 12 N. Y. Week. Dig. 344. But in *Mutual Life Ins. Co. v. Lawrence*, 5 Brad. App. 280; S. C., 8 Id. 488, it was decided that under a condition avoiding the policy for "self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time," a death by culpable negligence in taking an overdose of laudanum to relieve pain would vitiate the contract. In *Jacobs v. National Life Ins. Co.*, 4 Ins. L. J. 339, in the supreme court of the District of Columbia, under a condition in a life policy for the forfeiture of the insurance money if the assured should die by his own hand or act, "voluntarily or otherwise," the latter word was held too vague and uncertain to cover a self-destruction by the assured while insane.

6. *Insanity Induced by Intemperance Causing Suicide* avoids a policy where there is an express provision against intemperance: *Jarvis v. Connecticut Mut. Life Ins. Co.*, 5 Ins. L. J. 507; S. C., 6 Id. 311.

7. *Burden of Proof as to Suicide and Insanity of Assured Excusing Suicide.* Where, upon the death of a person whose life is insured, the defense is that the death was by suicide, and the manner of death is not known, the presumption is against suicide, and the burden of proof is on the insurers to show that to have been the cause of death: *Mallory v. Traveler's Ins. Co.*, 47 N. Y. 52; S. C., 7 Am. Rep. 410; 2 Ins. L. J. 839; *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580; S. C., 1 Big. Life & Acc. Ins. Cas., 590; *Germain v. Brooklyn Life Ins. Co.*, 14 N. Y. Week. Dig. 288; S. C., 18 Id. 107; *Phillips v. Louisiana etc. Ins. Co.*, 26 La. Ann. 404; S. C., 21 Am. Rep. 549; *John Hancock Mut. Life Ins. Co. v. Moore*, 34 Mich. 41; *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 225; S. C., 6 Ins. L. J. 35; *Snyder v. Mutual Life Ins. Co.*, 3 Id. 579; S. C., 4 Big. Life & Acc. Ins. Cas. 424; *Guardian Mutual Life Ins. Co. v. Hogan*, 80 Ill. 35; *Stormont v. Waterloo etc. Ass. Co.*, 1 Fost. & F. 22. Evidence that the deceased believed in spiritualism, or was an atheist or infidel, is not admissible to show that he took his own life: *Gibson v. American Mut. Life Ins. Co.*, 37 N. Y. 580; S. C., 1 Big. Life & Acc. Ins. Cas. 590; *Continental Ins. Co. v. Delpeuch*, 82 Pa. St. 225; S. C., 6 Ins. L. J. 35.

On the other hand, where suicide is proved, it raises no presumption and is not of itself evidence that the assured was insane or committed the suicidal act under the influence of insanity, and the onus is on the plaintiff to prove insanity if he relies upon it to avoid the forfeiture: *Merrill v. Cotton States Life Ins. Co.*, 55 Ga. 103; *Fowler v. Mutual Life Ins. Co.*, 4 Lans. 202; *Coffey v. Home Life Ins. Co.*, 3 Jones & S. 314; S. C., 2 Big. Life & Acc. Ins. Cas. 602; *Weed v. Mutual Benefit Life Ins. Co.*, 3 Jones & S. 386; S. C. in court of appeals, 70 N. Y. 561; *Phadenhauer v. Germania Life Ins. Co.*, 7 Heisk. 567; S. C., 19 Am. Rep. 623; *Terry v. Mutual Life Ins. Co.*, 1 Dill. 403; S. C., 1 Ins. L. J. 132; *Hiatt v. Mutual Life Ins. Co.*, 2 Dill. 572; *Gay v. Union Mut. Life Ins. Co.*, 9 Blatchf. 142; S. C., 2 Big. Life & Acc. Ins. Cas. 4; *Jarvis v. Connecticut Mut. Life Ins. Co.*, 5 Ins. L. J. 507; S. C., 6 Id. 311; *Moore v. Connecticut Mut. Life Ins. Co.*, 3 Id. 444; S. C., 4 Big. Life & Acc. Ins. Cas. 138; *Coverston v. Connecticut Mut. Life Ins. Co.*, Id. 169; *McClure v. Mutual Life Ins. Co.*, Id. 320; *Wolff v. Connecticut Mut. Life Ins. Co.*, 8 Ins. L. J. 97. Neither is a prior threat or attempt to commit suicide, standing alone, evidence of insanity: *Wolff v. Connecticut Mut. Life Ins. Co.*,

supra. But such threat or attempt, or the fact of suicide itself, is evidence in connection with other circumstances to show insanity: *Id.*; *Eastabrook v. Union Mutual Ins. Co.*, 54 Me. 229; S. C., 1 Big. Life & Acc. Ins. Cas. 139. Evidence that the deceased, on committing suicide, left a letter stating that he feared he would become insane because of a certain malady which he had; that his malady was one tending to produce a morbid mental state; that he was a spiritualist; and that for several days before the fatal act he was somewhat excited and absent-minded, and less cheerful and talkative than usual, is not of itself sufficient to warrant the submission of the question of insanity to the jury: *Fowler v. Mutual Life Ins. Co.*, 4 Lans. 202.

8. *Exception in Favor of Bona Fide Assignee in Condition Avoiding Policy for Suicide* of the person whose life is insured, giving a right of action on the policy, notwithstanding the suicide, to such assignee, where the assignment is made a certain time before the death, is not against public policy, and is valid and binding: *Bunyon on Life Ass.* 73; *Moore v. Woolsey*, 4 El. & Bl. 243; S. C., 24 L. J. Q. B. 40; 1 Jur., N. S., 468; 28 Eng. L. & Eq. 248; *Dufaur v. Professional Life Ass. Co.*, 25 Beav. 599; S. C., 4 Jur., N. S., 841; 27 L. J. Ch. 817; *Jones v. Consolidated Inv. Ass. Co.*, 26 Beav. 256; S. C., 5 Jur., N. S., 214; 28 L. J. Ch. 66; 3 Big. Life & Acc. Ins. Cas. 192. And such exception applies in favor of an equitable assignee by deposit of the policy: *Dufaur v. Professional Life Ass. Co.*, *supra*; or by a letter charging the insurance money with a floating balance: *Jones v. Consolidated Inv. Ass. Co.*, *supra*. So it applies in favor of the insurance company itself under an assignment of the policy as collateral security for a loan: *White v. British Empire etc. Ass. Co.*, L. R., 7 Eq., 394; S. C., 19 L. T., N. S., 306; 38 L. J. Ch. 53. But it does not apply in favor of an assignee by operation of law, as an assignee in bankruptcy: *Jackson v. Forster*, 5 Jur., N. S., 547; S. C., 1 El. & Bl. 463, 470; 2 Big. Life & Acc. Ins. Cas. 567, 571. Where there is no condition of forfeiture for suicide, as heretofore stated, a policy for the benefit of the assured's wife and children is not vitiated by his suicide: *Fitch v. American Popular Life Ins. Co.*, 59 N. Y. 557; *Patrick v. Excelsior Life Ins. Co.*, 67 Barb. 202; S. C., 4 Hun, 263.

OGDEN v. MARSHALL.

[8 NEW YORK (4 SELDEN), 340.]

CARRIER'S REFUSAL TO PERFORM CONTRACT FOR TRANSPORTATION OF GOODS over a certain voyage, at a definite price, entitles the shipper to recover the difference between the contract price and the ordinary cost of sending by other carriers; and this, without his making proof that at the time of the refusal he had the goods in question ready for shipment.

APPEAL by the plaintiff from a judgment in his favor for only nominal damages. The facts appear in the opinion.

Marshall S. Bidwell, for the appellant.

Daniel Lord, for the respondent.

By Court, JEWETT, J. It was assumed on the trial in the court below, and on the argument in this court, that the evidence

tended to establish a valid contract made between the parties, by which the defendant agreed to receive from the plaintiff, on board of the packet-ship *Yorkshire*, twelve thousand bushels of corn at New York, and carry it to the port of Liverpool, and to sail on the sixteenth day of January, 1847, at and for the price of sixteen pence sterling per bushel, which the defendant afterwards refused to perform; and that after the making of the contract, and before the sailing of the ship, freight rose to nineteen pence sterling per bushel. The only question submitted is, whether the plaintiff, under these circumstances, is limited in his recovery for such a breach of the contract to nominal damages.

It is a general rule of law, that when an injury has been sustained for which the law gives a remedy, that remedy shall be commensurate to the injury sustained. On all contracts, the party injured by the breach or non-performance is entitled to a full indemnity. From the facts in this case, I think that the difference between the price agreed upon for transporting the corn and that for which its carriage might have been obtained by others at the time when the ship was to receive the corn is the true measure of damages for the breach of the contract by defendant.

In the case of *Bracket v. McNair*, 14 Johns. 170 [7 Am. Dec. 447], it was held that in an action for the breach of a contract to transport salt from Oswego to Queenston, where, by the refusal and neglect of the carrier to take the salt at the time agreed, the opportunity to transport the same was wholly lost by the intervention of the embargo or non-intervention act, the difference between the value of the salt to be carried at the place of its intended embarkation and its value at the place of its intended delivery, less the carriage and necessary expenses, was the true measure of damages. The principle of that case governed the decision in *O'Conner v. Forster*, 10 Watts, 418.

The judge erred in his charge to the jury that the plaintiff was not entitled to recover beyond nominal damages. The judgment must be reversed, and a new trial ordered, with costs to abide the event.

RUGGLES, C. J., and GARDINER, JOHNSON, and MASON, JJ., concurred.

WILLARD, J., delivered a dissenting opinion; TAGGART, J., also dissented.

Judgment reversed, and new trial ordered.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT: See *Eichel v. Murphey*, 53 Am. Dec. 607, note 611; *Cole v. Swanston*, 52 Id. 288; *Masterton v. Mayor etc. of Brooklyn*, 42 Id. 88, note 48, where this subject is discussed; *Driggs v. Dwight*, 31 Id. 283, note 285, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Post v. Aetna Ins. Co.*, 43 Barb. 366, to the point that conditions precedent are waived by such conduct on the part of the party entitled to insist upon them as is inconsistent with the purpose to require the performance of them; and in *Grund v. Pendergast*, 58 Id. 223, to the point that when a party can send by another conveyance he must do so, and he will be entitled to recover the difference between the price at which the defendant undertook to carry the property and the price which the plaintiff is compelled to pay for its transportation. It is also distinguished in *Nelson v. Plimpton F. P. R. Co.*, 55 N. Y. 485.

WADSWORTH v. SHARPSTEEN.

[8 NEW YORK (4 SELDEN), 383.]

CONTRACTS BY PERSON WHO HAS BEEN FOUND HABITUAL DRUNKARD can not be sustained by proof that the promisor was sober when they were made; the incapacity is continuous until the commission is superseded.

INQUEST AND FINDING OF HABITUAL DRUNKENNESS suspends the capacity of the subject of them to make contracts and transact business, as toward all persons, whether they have had actual notice of the proceedings or not.

APPEAL from a judgment in favor of defendant sued as indorser. The facts appear from the opinion. The cause was submitted.

O. Hastings, for the appellant.

H. R. Selden, for the respondent.

By Court, RUGGLES, C. J. When a man has been found, by inquisition duly taken, in pursuance of the statute, to be incapable of conducting his own affairs in consequence of habitual drunkenness, his property, real and personal, is taken out of his hands and put into the custody and control of a committee. The object of this proceeding, as declared in the statute, 2 R. S. 52, is to prevent the property being wasted and destroyed, and to provide for the maintenance of himself and his family and the education of his children. The committee is required to file an inventory of the property, and to give security for the performance of the trust. This trust continues, without interruption, until the death of the drunkard or the superseding of the commission. The right of the committee to the custody and control of the property is not superseded during the drunkard's sober intervals; and therefore, during such intervals, the drunkard has no

more authority to deal with or dispose of the property than while he is in a state of intoxication. If it were otherwise, the proceedings would furnish a very ineffectual security against waste and improvidence. Every transaction would be open to litigation upon the question whether it took place while the drunkard was in a state of sobriety or intoxication; and the committee could not execute his trust with safety to himself or benefit to the drunkard or his family. Similar consequences would unavoidably follow from permitting the drunkard during sober intervals to contract debts or incur liabilities by which the property might be seized and sold on judgment and execution.

The effect of the inquisition is, that the drunkard is incapable at all times of conducting his affairs; and they are therefore taken wholly out of his control. From the very nature and object of the proceeding, therefore, the inquisition must be regarded as conclusive evidence of the incapacity of the drunkard to dispose of his property or to contract debts from the time when it is found. This was so decided in *L'Amoureux v. Crosby*, 2 Paige, 427 [22 Am. Dec. 655]; and in *Leonard v. Leonard*, 14 Pick. 283, a decree of the probate court declaring a person *non compos mentis*, and putting him under guardianship, was held to be conclusive evidence of the disability of the ward against a person dealing with him during his wardship.

It is contended, however, that the inquisition ought not to be conclusive against the plaintiff, a *bona fide* holder of the bill on which the action was brought, and who had no notice of the proceeding when he took the defendant's agreement to waive the protest of the draft.

The general rule undoubtedly is, that a decree or other judicial proceeding binds those only who are parties to it; but there are exceptions to this rule. Proceedings *in rem* are conclusive on all the world: 1 Stark. Ev. 246, 247, Phila. ed. 1837; and inquisitions being made under competent public authority, to ascertain matters of public interest and concern, are said to be analogous to proceedings *in rem*, to which no one can strictly be said to be a stranger. They are clearly admissible in evidence. Inquisitions of this nature are public and notorious, and presumed to be known to those who subsequently deal with the subjects of them; and as to all business which the committee is authorized to transact for the drunkard, strangers must deal with the committee, and not with the drunkard, until the inquisition is set aside. There can be no doubt of the authority of the court to order an issue. at the instance of a creditor, for

the purpose of retrying the facts found by the inquisition, and of setting it aside: *In the Matter of Christie*, 5 Paige, 242; *In the Matter of Giles*, 11 Id. 243. The creditor is, therefore, not without remedy against an inquisition improperly found. And if the creditor should happen to suffer from making a contract with a drunkard, without knowledge of the inquisition, and should thereby sustain a loss, the hardship is no greater than if he dealt with a minor believing him to be of full age. It is his duty to ascertain whether those he deals with have the capacity to contract.

There are many *dicta* in the books to the effect that inquisitions of lunacy are admissible, but not conclusive evidence; but in all the cases where these *dicta* are found, the question arose upon contracts or conveyances made before the finding of the inquisition. It has been adjudged, however, that the inquisition is not conclusive evidence of the lunatic's incapacity to make a will. This is an exception to the general rule, and the reason given for it in the case of *Leonard v. Leonard*, 14 Pick. 284, is, that this is an act which the guardian can not do for him. And in another case, that the making of a will is an act manifestly distinguishable from contracts and other acts done *inter vivos*, and involves no conflict of authority with the guardian, because the will can not operate to any purpose till the death of the testator; and by that same event the authority of the guardian is determined: *Breed v. Pratt*, 18 Id. 116. To these may be added, as especially applicable to the case of an habitual drunkard, that the chief object of the proceeding by inquisition is the preservation of his property during his life-time, for the benefit of himself and his family, and that the motives which might induce him to make an improper disposition of it during his life-time do not exist in relation to a disposition to take effect after his death.

The judgment of the supreme court should be affirmed.

GARDINER, JEWETT, JOHNSON, MASON, MORSE, and TAGGART, JJ., concurred.

WILLARD, J., delivered a dissenting opinion.

Judgment affirmed.

CONTRACTS OF INTOXICATED PERSONS: See *Newell v. Fisher*, 49 Am. Dec. 66, note 68; *Gardner v. Gardner*, 34 Id. 340, note 353; *Heirs of French v. French*, 31 Id. 441, note 442; *Crane v. Conklin*, 22 Id. 519, note 526. As to all business which the committee is authorized to transact for the drunkard, strangers must deal with the committee, not with the drunkard, until the in-

quisition is set aside: *Lewis v. Jones*, 5 Barb. 648, citing the principal case. Incapacity is continuous until the commission is superseded: *Redden v. Baker*, 86 Ind. 195, citing the principal case.

LIABILITY OF INSANE PERSON ON HIS CONTRACTS: See *King v. Robinson*, 54 Am. Dec. 614, note 619, where other cases are collected.

INQUISITION OF LUNACY, EFFECT OF, AS EVIDENCE: *Gangwere's Estate*, 53 Am. Dec. 554, note 561, where other cases are collected. An inquisition is only presumptive evidence of incapacity at any time prior to the finding, although retrospectively included: *Banker v. Banker*, 63 N. Y. 413, citing the principal case. Inquisitions are *prima facie* evidence even against strangers to the proceedings: *Goodsell v. Harrington*, 3 Thomp. & C. 346, citing the principal case.

CONTRACTS MADE AFTER INQUISITION: See note to *Jackson v. King*, 15 Am. Dec. 368.

COON v. KNAP.

[8 NEW YORK (4 SELDEN), 402.]

WRITTEN ACKNOWLEDGMENT OF MONEY AS RECEIVED "IN FULL" for a demand for unliquidated damages is not within the rule which allows a simple receipt to be contradicted by parol; but is treated as a release, and, unless obtained by fraud, etc., bars any further claim.

APPEAL from a judgment in favor of plaintiff in an action for personal injuries caused by the negligence of servants of the defendant, a stage-coach proprietor. The facts appear from the opinion. The cause was submitted.

Southward and Pritchard, for the appellant.

J. B. Eldredge, for the respondent.

By Court, WILLARD, J. The plaintiff, after receiving her injury, gave the defendant a receipt in these words: "Rec'd, Brookfield, July 11, 1849, of William D. Knap, forty dollars in full for damage done to us by the stage accident of the thirteenth of June last," signed by plaintiff; and the judge at the circuit held that this receipt constituted a bar to the action, and should be so held by the jury, unless the plaintiff has shown by parol evidence that there was a condition annexed to the receipt which did not appear in the receipt itself. The jury found there was such a condition, and gave a verdict for the plaintiff for three hundred and forty dollars. The only point I shall consider is, whether it was admissible to show by parol evidence that the receipt was given upon a condition not expressed in it, and thus get rid of its effect. A majority of the supreme court in the fifth district held such evidence admissible, and affirmed the

judgment of the circuit court. In my opinion, the evidence was inadmissible, and should have been excluded.

The supreme court of the fourth district, in *Egleston v. Knickerbacker*, 6 Barb. 458, gave to this subject an elaborate examination. We held to the general rule that parol evidence is inadmissible to contradict or explain a written agreement. We showed that a receipt is so far an exception to this rule that it may be explained, as to the consideration part, when the explanation is not contradictory to but consistent with the instrument. We held, also, that a receipt, absolute in its terms, can not be shown by parol evidence to be upon a condition, except on a proceeding to reform the instrument for fraud or mistake. And we observed that when a receipt was in the nature of a contract, it fell within the general rule applicable to contracts. If that decision be law, the judgment under review was erroneous, and should be reversed. The leading cases are reviewed in *Egleston v. Knickerbacker*, *supra*; and the whole subject is fully considered in Dart on Vendors, 451, and notes, where various other cases to the same effect are cited. See *Houster v. Shindler*, 11 Id. 36, as to explaining receipts.

Justice Pratt, who gave the prevailing opinion in this case, disregards the opinion of the court of the fourth district in *Egleston v. Knickerbacker*, *supra*. He admits that the opinion might create some little embarrassment had it not been overruled by the supreme court in the eighth district, in *White v. Parker*, 8 Barb. 48. With deference be it said, Justice Pratt has misrepresented the opinion in *Egleston v. Knickerbacker*, *supra*; and is wholly mistaken when he says that the opinion of Mullett, J., in *White v. Parker*, *supra*, is at variance with that of Willard, J., in *Egleston v. Knickerbacker*, *supra*. The two are in strict harmony with each other.

When the case of *White v. Parker*, *supra*, was decided, that of *Egleston v. Knickerbacker*, *supra*, was not reported, and of course it is not referred to by Judge Mullett. It will be seen, by looking at Judge Mullett's opinion (8 Barb. 69), that the explanatory evidence which he held admissible was to show that though the receipt purported to be for three hundred and fifty-four dollars and eighty-three cents, in meaning it was in truth given for land contracts. The explanation related to the consideration, and is precisely such a one as the supreme court in the fourth district held admissible in *Egleston v. Knickerbacker*, *supra*. In the present case, had the plaintiff proposed to show that the forty dollars paid her, instead of being gold and silver, was a counter-

feit note, it would have been competent: *Houston v. Shindler*, *supra*. The opinion of Nelson, J., in *Kellogg v. Richards*, 14 Wend. 118, 119, lays down the rule, in substance, like that advanced in *Egleston v. Knickerbacker*, *supra*.

It is possible that the defendant obtained the advantage of the plaintiff in the settlement for her damages; but she can not be relieved in this way without unsettling principles which have long been firmly established. The jury were not asked to inquire whether the receipt was obtained by fraud, or that the plaintiff gave it under any mistake or misapprehension of her rights. They were simply instructed to inquire whether a parol condition was made, not appearing in the receipt. This, in my judgment, was wrong. The sympathy which the jury could not fail to find for the plaintiff, a young lady, in her misfortune, should not influence the court to pervert the law for her advantage.

The judgment of the supreme court and of the circuit court should be reversed, and a new trial ordered, with costs to abide the event.

TAGGART, J. I have tried faithfully to find some ground for sustaining the judgment in this case, but can not satisfy myself that it can be sustained without violating one of the most essential elementary principles. This is not an ordinary receipt, given on payment of a sum of money, which is allowed to be explained by showing by parol that certain matters were not included in the receipt, or intended to be discharged thereby. I have but little doubt, myself, that the defendant drew the receipt with the design basely and dishonestly to entrap the plaintiff into signing a paper the purport of which she did not understand; that she placed implicit confidence in the defendant, and neither examined nor appreciated the true character or effect of the receipt given; that she did not intend to give other than a partial discharge, and has, without knowing the meaning of the terms of the receipt, given a full discharge of all damages against the defendant.

The instrument in question in this action is evidence of a compromise or settlement of the damages occasioned by the accident. It is not technically a receipt for money on account, which may be explained by parol, by showing that some particular item was not intended to be included; it was in full for damages occasioned by a particular transaction. It is, in effect, a release of the defendant from all liability occasioned by that transaction. This subject has been so elaborately discussed in

various decisions, that I deem it unnecessary to go fully into a consideration of the authorities. The case of *Kellogg v. Richards*, 14 Wend. 116, is much like this; the receipt in that case was as follows: "Received of Richards & Sherman, S. H. Addington's note, dated July 30, 1828, payable four months from date, for four hundred and thirty-one dollars and forty cents, as a compromise for the full amount of the note." The amount of the note referred to was one thousand six hundred and twenty-nine dollars and forty-four cents. The court decided that the paper was more than a single receipt; it was an agreement of compromise by which the plaintiff agreed to take Addington's note for four hundred and thirty-one dollars and forty cents, as a compromise for the full payment of defendant's note; and being made *bona fide* without fraud, could not be contradicted by parol; while the court recognized the rule laid down in *Ensign v. Webster*, 1 Johns. Cas. 145 [1 Am. Dec. 108], and numerous other authorities, that a receipt is not conclusive, but may always be inquired into. The receipt in this case, although not expressed to be upon a compromise, clearly was so upon its face. It is, therefore, in the nature of a contract, and is so far within the general rule that it is not liable to be varied by parol evidence.

Judgment reversed, and new trial ordered.

MASON, J., dissented.

All the other judges concurred.

RECEIPTS MAY BE EXPLAINED BY PAROL: *Shotwell v. Hamblin*, 55 Am. Dec. 83, note 87, where other cases are collected; *Trull v. Barkley*, 11 Hun, 645, citing the principal case; *O'Brien v. Gilchrist*, 56 Am. Dec. 676.

PAROL EVIDENCE IS NOT ADMISSIBLE TO EXPLAIN RELEASE: *Buswell v. Poincer*, 37 N. Y. 314; S. C., 35 How. Pr. 450; S. C., 4 Abb. Pr., N. S., 247; *Allen v. Cowan*, 28 Barb. 108; *Ryan v. Ward*, 48 N. Y. 207, all citing the principal case. So far as a receipt partakes of the nature of a contract, it falls within the rule excluding parol evidence to contradict or explain it: *Bonesteel v. Flack*, 41 Barb. 437; S. C., 27 How. Pr. 323; *Howard v. Norton*, 65 Barb. 167; *Earle v. Crane*, 6 Duer, 571; *Downing v. Smith*, 4 Redf. 312; *Hammond v. Christie*, 5 Robt. 167; *Ludington v. Miller*, 38 N. Y. Superior Ct. 480, all citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Farmers' Bank of Amsterdam v. Blair*, 44 Barb. 653, to the point that compromises are to be encouraged, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise, but will hold the parties concluded by the settlement; and in *Hammond v. Christie*, 5 Robt. 167, to the point that a contract agreeing to take a certain sum in full compensation for damages arising out of personal injuries can be pleaded in bar of an action brought to recover damages for such injuries. The principal case is distinguished in *McDougall v. Cooper*, 31 N. Y. 500.

BARTO v. HIMROD.

[8 NEW YORK (4 SELDEN), 483.]

LEGISLATURE CAN NOT SUBMIT LAW TO PEOPLE in such manner as to make its final enactment depend on the popular vote, unless when specially authorized by the constitution.

APPEAL from a judgment in favor of plaintiff, suing to recover back property seized for non-payment of a school tax, levied under a law the validity of which he disputed. The facts appear from the opinion.

Anasa Dana, for the appellant.

Samuel Beardsley, for the respondent.

By Court, RUGGLES, C. J. (after stating the provisions of the statute). It will be observed that although the act directs the inspectors of the election in each town to canvass the ballots for and against the law, and to make return thereof in the same manner as votes for governor and lieutenant-governor are canvassed and returned, it makes no such provision for the county or state canvass; and it gives no direction to the county clerks, or to the county or state canvassers, in relation to their duty. It provides that if a majority of all the votes in the state shall be against the law, it shall be void, and if in its favor, it shall be valid; but it fails entirely in pointing out the mode in which the general result of the popular vote is to be ascertained and determined. The general election law contains no provision applicable to this case. The state canvassers could not have been made answerable, civilly or criminally, for neglecting or refusing to canvass the votes and certify the result, because they were not required to do so by the statute itself, nor by the general election law; whatever they may have done in regard to it was voluntary and unofficial.

Courts are in general bound to take judicial notice of public statutes. They have the means of knowing from the statute-books, and therefore are presumed to know, what laws are in force. But that rule is inapplicable to a case like the present. It can not be ascertained from the statute-book whether the act of 1849 was adopted or rejected by the popular vote. The certificate of the state canvassers would not be legal evidence on that question, because it is not made so by the act, and because they had no authority to determine or certify the result of the vote. The act of 1849 does not prescribe the evidence by which it is to be known whether the act took effect or not. It was

imperfect in its provisions; and there seems to be no mode of ascertaining by legal evidence the result of the vote upon it except by the production and examination of the returns of the town inspectors of elections; these officers only were empowered to make the certificates.

In the present case, the result of the popular vote was neither admitted on the pleadings nor established by evidence; and there was a total defect in the proof that the act had been adopted by the vote of the people. We should therefore be compelled to affirm the judgment of the supreme court for the want of this proof, whether the law is valid or not.

But upon the argument in this court the case was rested mainly on the objection to the validity of the statute, on the ground that it was never enacted, in form or spirit, according to the constitution, and therefore never took effect, although it may have had the vote of the people in its favor. This objection to the validity of the act has been several times under consideration in the supreme court. In one of the districts it was held to be constitutional and valid; in three others it was adjudged to be void. The immediate practical importance of the question has been much diminished by the enactment, in the usual form, of "an act to establish free schools throughout the state," passed April 12, 1851: Laws 1851, p. 292. To this statute the objections made to the act of 1849 do not apply. The question is, however, still highly important in regard to future legislation, and as such it has been carefully considered; and we are of opinion that the act in question is invalid, because the provisions contained in it in relation to free schools were never constitutionally enacted.

The legislative power in this state is vested by the constitution in the senate and assembly: Art. 3, sec. 1. The power of passing general statutes exists exclusively in the legislative bodies; in one instance only it is limited or qualified: "No law for the contracting of a debt shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election:" Art. 7, sec. 12. In this special and single case the people, by the constitution, reserved legislative power to themselves. The legislature pass the bill in the usual form of enactment, but the statute has no force or authority until it is sanctioned by a vote of the people. In substance and reality, the legislature propose the law; the people pass or reject it by a general vote. This is legislation by the people

The exercise of this power by the people in other cases is not expressly and in terms prohibited by the constitution; but it is forbidden by necessary and unavoidable implication. The senate and assembly are the only bodies of men clothed with the power of general legislation. They possess the entire power with the exception above stated. The people reserved no part of it to themselves, excepting in regard to laws creating public debt; and can, therefore, exercise it in no other case.

The act of 1849 does not, on its face, purport to be a law as it came from the hands of the legislature, for any other purpose than to submit to the people the question whether its provisions in relation to free schools "should or should not become a law:" Sec. 10; and by section 14 the act was to become law only in case it should have a majority of the votes of the people in its favor. Without contradicting the express terms of the tenth and fourteenth sections, it can not be said that the propositions contained in it, in relation to free schools, were enacted as law by the legislature. They were not law, or to become law, until they had received a majority of the votes of the people, at the general election, in their favor, nor unless they received such majority. It results, therefore, unavoidably, from the terms of the act itself, that it was the popular vote which made the law; the legislature prepared the plan or project, and submitted it to the people to be passed or rejected.

The legislature had no power to make such submission, nor had the people the power to bind each other by acting upon it. They voluntarily surrendered that power when they adopted the constitution. The government of this state is democratic; but it is a representative democracy, and in passing general laws, the people act only through their representatives in the legislature.

In *Johnson v. Rich*, 9 Barb. 680, it was held by the supreme court in the seventh district, that the act in question was a valid law, on the ground that it was a conditional statute made to take effect upon the happening of a future contingent event, to wit, the vote of a majority of the people in its favor. It is not denied that a valid statute may be passed, to take effect upon the happening of some future event, certain or uncertain; but such a statute, when it comes from the hands of the legislature, must be law *in præsenti* to take effect *in futuro*. If the observations already made are correct, the act of 1849 was not such a statute. But if, by the terms of the act, it had been declared to be law from the time of its passage, to take effect in

case it should receive a majority of votes in its favor, it would nevertheless have been invalid, because the result of the popular vote upon the expediency of the law is not such a future event as the statute can be made to take effect upon, according to the meaning and intent of the constitution.

The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law—an event on which the expediency of the law, in the judgment of the law-makers, depends. On this question of expediency the legislature must exercise its own judgment, definitely and finally. When a law is made, to take effect upon the happening of such an event, the legislature, in effect, declare the law inexpedient if the event should not happen; but expedient if it should happen. They appeal to no other man or men to judge for them in relation to its present or future expediency; they exercise that power themselves, and then perform the duty which the constitution imposes upon them.

But in the present case, no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free-school act, abstractly considered, did not depend on the vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterwards.

The event on which the act was made to take effect was nothing else than the vote of the people on the identical question which the constitution makes it the duty of the legislature itself to decide. The legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they can not delegate or commit to any other man or men to be exercised. They have no more authority to refer such a question to the whole people than to an individual. The people are sovereign, but their sovereignty must be exercised in the mode which they have pointed out in the constitution. All legislative power is derived from the people; but when the people adopted the constitution, they surrendered the power of making laws to the legislature, and imposed it upon that body as a duty. They did not reserve to themselves the power of ratifying or adopting laws proposed by the legislature, except in the single case of contracting public debt. They probably foresaw the evil consequences likely to arise from such a reservation; these are well and forcibly expressed by Mr. Jus-

tice Johnson, in his opinion in the case of *Johnson v. Rich*, 9 Barb. 686. "I regard it," said he, "as an unwise and unsound policy, calculated to lead to loose and improvident legislation, and to take away from the legislator all just sense of his high and enduring responsibility to his constituents and to posterity, by shifting that responsibility upon others. Experience has also shown that laws passed in this manner are seldom permanent, but are changed the moment the instrument under which they are ratified has abated or reversed its current. Of all the evils which afflict a state, that of unstable and capricious legislation is among the greatest."

For further illustration, let us suppose that the tenth and subsequent sections of the act of 1849 had directed the attorney general, or the archbishop of the catholic church, or the common council of the city of New York, to certify, on the next general election day, whether, in his or their opinion, that act ought to become a law; and had further provided that the act should or should not take effect according to such certificate: it can not be pretended that the statute would have become operative upon the making of the certificate in its favor. The constitution does not authorize the power of legislation to be so delegated. If the legislature can not delegate to an individual the authority to determine, by the mere exercise of his judgment, whether a statute ought to take effect, or become a law, it follows, as a necessary consequence, that they can not delegate it to the whole people; the constitution has no more authorized it in the latter case than in the former. The people have limited the exercise of their own power to the modes pointed out in the constitution; and although they hold the ultimate sovereignty of the state, they are subject, like other sovereigns, to established fundamental law. The people may change or abrogate that law, but they are bound by it until changed or abrogated.

The judgment of the supreme court ought to be affirmed.

WILLARD, J. The objection to the law is, that it was not enacted in the manner prescribed by the constitution, but was submitted by the legislature to the electors, to determine by ballot, at the annual election in November, 1849, whether the act should or should not become a law.

By the eleventh section of the seventh article of the constitution, the legislature is prohibited from creating any debts, except such as are specified in the tenth and eleventh sections of the same article, unless in the manner therein mentioned; and no

such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all the votes cast for and against it at such election. The section also provides that on the final passage of such bill, in either house of the legislature, the question shall be taken by ayes and noes, to be duly entered on the journals thereof, and shall be, "Shall this bill pass, and ought the same to receive the sanction of the people?" A subsequent clause in the same section provides that no such law shall be submitted to be voted on within three months after its final passage, nor at any general election when any other law, or any bill, or any amendment of the constitution, shall be submitted to be voted for or against. This is the only case in which a law is required to be submitted to the people; and there is no other part of the constitution that recognizes, even by implication, the right of the legislature thus to delegate their trust. It is worthy also of remark, that in this case the legislature are required to assume all the responsibility which attaches upon the passage of a law; for they are required to respond in the affirmative, not only to the question whether the bill shall pass their respective houses, but also whether it ought to receive the sanction of the people. The members of the legislature, therefore, can not, in making a submission to the people, under this section, elude the responsibility which properly belongs to their station.

I pass by, as inapplicable to this discussion, the thirteenth article of the constitution, which provides for the submission to the people, by the legislature, of proposed amendments to that instrument. And I do not mean to lay much stress upon the implication arising from the express provision to submit a law creating a debt to the people, and the silence of the constitution in relation to submitting to the people other matters of legislation. The maxim, *Expressio unius est exclusio alterius*, is more applicable to deeds and contracts than to a constitution, and requires great caution in its application in all cases.

The present question must be decided with reference to our existing constitution. By that instrument, the legislative power of the state is vested in a senate and assembly; Const., art. 3, sec. 1. The enacting clause of all bills is required to be, "The people of the state of New York, represented in senate and assembly, do enact as follows." It is not the people at the polls who enact a law, but the people represented in senate and assembly. Every bill, before it becomes a law, must receive the assent of a majority of all the members elected to each branch of the

legislature, and the question upon its final passage must be taken immediately upon its last reading, and the yeas and nays entered on the journal: *Id.*, secs. 14, 15. The assent of two thirds of the members elected to each house is requisite to every bill appropriating the public moneys or property for local or private purposes: Art. 1, sec. 9. On the final passage in either house, of every act which imposes, continues, or revives a tax, or creates a debt or charge, or makes, continues, or revives any appropriation of public or trust money or property, or releases, discharges, or commutes any claim or demand of the state, the question shall be taken by yeas and nays, which shall be duly entered on the journal, and three fifths of all members elected to either house shall, in all such cases, be necessary to constitute a quorum therein: *Id.*, art. 7, sec. 14. These various provisions are designed to insure the full attendance of both houses when a bill is passed, and to cause the members to feel their individual responsibility. It is worthy of note, that the act under consideration falls within the fourteenth section of article 7, just quoted, and required a quorum of three fifths of all the members elected to both branches of the legislature to be present at the time of the final vote on its passage.

All the foregoing provisions contemplate that a law receives its vitality from the legislature. The representatives of the people are the law-makers, and they are responsible to their constituents for their conduct in that capacity. By following the directions of the constitution, each member has an opportunity of proposing amendments. The general policy of the law, as well as the fitness of its details, is open to discussion. The popular feeling is expressed through their representatives; and the latter are enlightened and influenced more or less by the discussions of the public press.

A complicated system can only be perfected by a body composed of a limited number, with power to make amendments and to enjoy the benefit of free discussion and consultation. This can never be accomplished with reference to such a system, when submitted to a vote of the people; they must take the system proposed, or nothing; they can adopt no amendments, however obvious may be their necessity. With respect to the single case, where the constitution requires a submission of the law to the people, the inconvenience is less felt, because only a single proposition is submitted, with respect to which no other answer can be given than yes or no.

The law under consideration is in conflict with the constitu-

tion in various respects. Instead of becoming a law by the action of the organs appointed by the constitution for that purpose, it claims to become a law by the vote of the electors; and it claims that the popular vote may make it void and restore the former law. All the safeguards which the constitution has provided are broken down, and the members of the legislature are allowed to evade the responsibility which belongs to their office.

It is not denied that a law may be passed to take effect on the happening of a future event. There are numerous examples of this species of legislation which are not obnoxious to any objection. The general appropriation bill each year affords numerous specimens. Thus an appropriation of four thousand dollars is usually made for the apprehension of fugitives from justice; the money is not payable until a fugitive has been apprehended, and the requisite evidence of the arrest, together with the amount of expenses, furnished to the proper officer. There is also a standing appropriation for the apprehension of criminals, which does not become payable until the criminal has been arrested, and the proof thereof has been produced. But in all these cases, the law does not derive its power from the arrest of the fugitive or the apprehension of the criminal, but from the legislature. Those cases are widely different from this: here, the law was not in force until the people had cast a majority of votes for it in a given way; in the other case, the law is in force whether there be a fugitive or a criminal, or not. The future event gives no additional efficacy to the law, but furnishes the occasion for the exercise of its power.

The fundamental error of the court in *Johnson v. Rich*, 9 Barb. 680, consists in confounding laws which become operative at a future day with laws which do not become operative until approved by a popular vote. In the first case, the law is complete when it has passed through the forms prescribed by the constitution, though its influence may not be felt until a subject-matter has arisen upon which it can act. A law punishing murder with death is inoperative until a murder has been committed. It is not, however, the murder which imparts efficacy to the law: the latter was complete when first enacted; and the murder merely affords the opportunity for awakening its energies. Had no murder ever been committed, it would still be a law, threatening vengeance on the crime whenever it should be perpetrated.

It was far otherwise with the free-school law: had a majority of the electors failed to vote for it, no one pretends that it would

have been a law. The voting by the electors does not furnish the occasion for the exercise of the power of the law, but was designed to give vitality to what was before lifeless. In short, the law was a mere proposition submitted to the people, to be adopted or rejected as they pleased. If this mode of legislation is permitted and becomes general, it will soon bring to a close the whole system of representative government which has been so justly our pride. The legislature will become an irresponsible cabal, too timid to assume the responsibility of law-givers, and with just wisdom enough to devise subtle schemes of imposture to mislead the people. All the checks against improvident legislation will be swept away, and the character of the constitution will be radically changed.

Without enlarging upon this subject, or reviewing the decisions in other states adverse to this mode of legislation, I think it is in conflict with our constitution.

Judgment affirmed.

LEGISLATURE CAN NOT DELEGATE LEGISLATIVE POWER TO PEOPLE AT LARGE, or to any portion of them: *Parker v. Commonwealth*, 47 Am. Dec. 480, note 500, where many other cases are collected; *Ex parte Wall*, 48 Cal. 313; *Groesch v. State*, 42 Ind. 557; *People v. Acton*, 48 Barb. 531; *Powers v. Shepard*, 49 Id. 433; S. C., 35 How. Pr. 61; *People v. Toynbee*, 12 Id. 265; S. C., 2 Park. Cr. 510; *People v. Board of Metropolitan Police*, 33 How. Pr. 59; *Winston v. English*, 44 Id. 503; S. C., 35 N. Y. Superior Ct. 520; *Wynhamer v. People*, 13 N. Y. 429; *State v. Hastings*, 10 Wis. 532, all citing the principal case. It is not competent for the legislature to pass an act to take effect only on the assent of the people being given to it: *Mayor of Brunswick v. Finney*, 54 Ga. 324; *Messmeier v. State*, 11 Ind. 487; *Santo v. State*, 2 Iowa, 205; *Burns v. Mayor etc. of Atchison*, 2 Kan. 486; *contra: Fell v. State*, 42 Md. 88; *State v. Wilcox*, 45 Mo. 461; *Lammert v. Lidwell*, 62 Id. 192; *Manly v. City of Raleigh*, 4 Jones Eq. 375, all citing the principal case.

ACT TAKING EFFECT OF WHICH IS MADE TO DEPEND UPON POPULAR VOTE IS VOID: *People v. Stout*, 4 Abb. Pr. 31; S. C., 23 Barb. 356; *Clarke v. City of Rochester*, 5 Abb. Pr. 110; S. C., 24 Barb. 468; S. C., 14 How. Pr. 196; *People v. Draper*, 15 N. Y. 558; *Clarke v. City of Rochester*, 28 Id. 633, all citing the principal case.

CONDITIONAL LEGISLATION IS VALID where there is no transfer of the legislative power or judgment: *Hobart v. Supervisors of Butte Co.*, 17 Cal. 34; *People v. Collins*, 3 Mich. 354, both citing the principal case. A statute may be passed to take effect upon the happening of some future event: *Lathrop v. Stedman*, 42 Conn. 594, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Rumsey v. People*, 19 N. Y. 46, to the point that no portion of the legislative power has been retained by the people; in *Cooper v. Schulta*, 52 How. Pr. 125, and in *Wood's Appeal*, 75 Pa. St. 64, to the point that the maxim, *Expressio unius est exclusio alterius*, is more applicable to deeds and contracts than to a constitution, and requires great caution in its application in all cases; and in *People v. Albertson*, 55 N. Y. 55, to the point that the restraints of the constitution can not be lessened or diminished.

by inference and implication. In the case of *State v. O'Neill*, 24 Wis. 154, Cole, J., delivering the opinion of the court, said: "The courts of New York, however, have not shown any disposition to extend the doctrine of *Barto v. Himrod* to local and special statutes, which relate to local government and matters of municipal concern."

THE PRINCIPAL CASE IS DISTINGUISHED in the following cases: *Blanding v. Burr*, 13 Cal. 357; *People v. Coon*, 25 Id. 646; *Alcorn v. Hamer*, 38 Miss. 751; *Corning v. Greene*, 23 Barb. 50; *Starin v. Town of Genoa*, 23 N. Y. 447; *Bank of Chenango v. Brown*, 28 Id. 470; *Gloversville v. Howell*, 70 Id. 290; *Carrier v. West-side E. R. R. Co.*, 6 Blatchf. 493; *Matter of Gilbert E. R'y Co.*, 70 N. Y. 374; S. C., 3 Abb. N. C. 446.

MASON v. ALSTON.

[9 NEW YORK (6 SELDEN), 28.]

DECREE DISMISSING BILL FILED TO SET ASIDE WILL, because its bequests were contrary to statute, does not estop the heirs from contesting the probate of the will on the ground of defect of execution.

ESTOPPEL MUST BE CERTAIN TO EVERY INTENT, and not be taken by argument or inference.

APPEAL from a judgment dismissing an injunction suit. The object of the injunction prayed was to restrain defendants from prosecuting a proceeding to impeach the execution of a will; and the ground assigned was that the will had been sustained in a prior suit brought to set it aside because its dispositions of property were contrary to the statute of the state.

Daniel Lord, for the appellants.

Charles O'Connor, for the respondents.

By Court, WILLARD, J. The object of the bill filed by James Mason, against the executors of his father's will and others interested in that estate, was to have the provisions of that will declared inoperative and void, as contrary to the statute, and the estate distributed in the same manner as if the testator had died intestate. All the parties engaged in that litigation took for granted the valid execution of the will. The sole matter in controversy which was passed upon and decided in the courts was whether the provisions in the will were in conflict with the revised statutes. The courts held they were not: *Mason v. Mason's Ex'rs*, 2 Sandf. Ch. 432; *Mason v. Jones*, 13 Barb. 461, affirmed in this court.

The decision of that question did not prevent any of the next of kin, although parties to that suit, from contesting the validity of the will by a direct proceeding before the surrogate, in

the manner pointed out by the statute. In that proceeding the only inquiry is whether the instrument in question is the last will and testament of the supposed testator. This goes to the *factum*, the legal execution of the will only. The other action made no issue upon this point, and its admission of the execution of the will is merely argumentative. It was not put in issue by the cause, nor could it have been made a material issue in that action. One of the principles in relation to an estoppel is, that it must be certain to every intent, and not be taken by argument or inference: Co. Lit. 352 b. The bill filed by James Mason was not filed to carry out the provisions of the will. It was filed in hostility to the disposition of the testator's property therein made. It did not call upon the defendants to admit or deny the execution of the will, and the answer does not admit it, but speaks of it as an instrument purporting to be the last will and testament of the deceased.

This case does not fall within the doctrine of estoppel, concluding the plaintiffs from asserting the truth; nor is the doctrine of *Le Guen v. Gouverneur*, 1 Johns. Cas. 492-502 [1 Am. Dec. 121], applicable to it.

I think the judgment of the supreme court should be affirmed.

All the judges concurred.

Judgment affirmed.

ESTOPPEL MUST BE CERTAIN TO EVERY INTENT, and not be taken by argument or inference: *Spofford v. Hobbs*, 48 Am. Dec. 521.

DISMISSAL OF BILL, WHEN BAR, AND WHEN NOT: See *Prilton v. Mott*, 34 Am. Dec. 678, note 679.

MURRAY v. JUDSON.

[9 NEW YORK (5 SELDEN), 73.]

PREFERRING CREDITOR WHOSE DEMAND IS USURIOUS IS NOT FRAUD ON OTHER CREDITORS, and does not avoid an assignment containing such preference.

JUDGMENT BY CONFESSION CAN NOT BE IMPEACHED BY OTHER CREDITORS of the judgment debtor on the ground of insufficiency of the statement.

APPEAL from a judgment dismissing a creditor's bill. The bill sought to set aside an assignment for the benefit of creditors, on the ground that it preferred a judgment entered upon confession which was void: 1. For usury; and 2. Because the statement described the indebtedness only as being on a note

instead of stating the true, original consideration. The cause was submitted.

Merritt and Hyde, for the appellant.

Henry R. Mygatt, for the respondents.

By Court, GARDNER, J. A debtor is not required to avail himself of the statutes against usury to avoid the payment of a debt otherwise justly due, any more than of the statute of limitations; and the omission to do either is not in itself the slightest evidence of an intent to defraud his creditors. It is rather evidence of a determination not to commit a fraud upon the lender for their benefit. This view disposes of the case. When the assignment was executed the debtor had the right, as against the complainant, in good faith, to dispose of his property as he pleased: *Candee v. Lord*, 2 N. Y. 269 [51 Am. Dec. 294]. He could have paid the usurious judgment. This is conceded; and if so, no good reason can be assigned why he could not appropriate property for that purpose, and direct its application by a trustee. The assignment was not a contract with the holder of the judgment, or a mere security for that debt, but the setting apart of property for the payment of a specified demand in the order designated. This is virtually assumed by the plaintiff, by insisting that the judgment creditor is not a necessary party to the suit.

The trust when created was irrevocable. Neither the debtor, the trustee, nor the *cestui que trust*, claiming as such, could avoid it. So much was determined in *Pratt v. Adams*, 7 Paige, 615, 639, 640, 641.

Now, if the assignment itself was usurious on the ground that it provided for the payment of a usurious debt, as the plaintiff insists, it would be singular if the borrower (who in this case was the assignor), for whose protection the statute against usury was enacted, could not avail himself of its provisions, not only to resist the payment of the judgment, but as a ground of resuming the trust fund appropriated for its discharge.

In a word, the contracts and securities avoided by the statute are those arising from some agreement, direct or indirect, with the usurer or those standing in his place. They do not include trusts or other appropriations of property made by the debtor without the agency of the creditor, subsequent to and independent of the usurious contract, as a means of satisfying the debt after it has been incurred.

It must be remembered that we are not asked to determine

whether a provision for a usurious debt may not in certain cases be evidence more or less cogent of a fraudulent intent on the part of the debtor, but whether the law will permit a trust for that purpose, to any extent, under any circumstances.

There is no force in the objection that the judgment was not confessed with all the formalities required by the code. Should it be admitted that it was void as a judgment, the debt arising from the loan of money existed, and was a good consideration for the assignment: *Pratt v. Adams, supra*. The plaintiff has lost nothing by the irregularity, and has no right to complain that by the assignment he has been deprived of an opportunity to take advantage of a technical defect in the rendition of the judgment, which the parties thereto have properly disregarded. I think the judgment should be affirmed.

WILLARD, J. 1. The judgment in favor of Sheldon, which is the preferred debt in the assignment, was regularly confessed according to section 383 of the code. See *Mann v. Brooks*, 7 How. Pr. 449, decided by Justice Cady, in point; and see also *Park v. Church*, 5 Id. 381.

2. The defense of usury is a personal defense, and was waived by the judgment debtor when he made the assignment and gave the preference. He had the same right to give the preference as he had to pay the debt, and the same consequences follow, so far as the plaintiff is concerned, as if he had paid it. The plaintiff is a mere stranger to the judgment of Sheldon against Judson, and can not insist upon its invalidity on the ground of usury: *Post v. Dart*, 8 Paige, 639; *Shufelt v. Shufelt*, 9 Id. 187 [37 Am. Dec. 381]; *Dix v. Van Wyck*, 2 Hill (N. Y.), 522. The plaintiff in this case, who is a junior judgment creditor of Judson, does not stand in legal privity with him, so as to enable him to avoid the prior usurious judgment in favor of Sheldon. Even had he become the purchaser of the real estate of Judson under his own execution, he could not have maintained an action to set aside Sheldon's judgment for usury without offering to pay the amount actually due. None but the borrower is excused by the statute from complying with that principle of equity, before invoking the aid of the court. This was so held by the court of errors in *Post v. Bank of Ulica*, 7 Hill, 391; approved in *Rexford v. Widger*, 2 N. Y. 131.

The judgment should be affirmed.

MASON, J., orally dissented from the position taken by WILLARD, J., that the judgment was regular; being of the opinion

that the code required a more specific statement of the consideration in a confession of judgment.

All the judges concurred in the positions assumed in the opinion of GARDINER, J.

Judgment affirmed.

DEBTOR'S PROVIDING FOR PAYMENT OF USURIOUS DEBT is not a fraud upon the other creditors: *Curtis v. Leavitt*, 17 Barb. 350, citing the principal case. A party may pay a usurious debt, or transfer property in payment of such debt, and the payment and transfer will be irrevocable: *Strong v. Strickland*, 32 Id. 287, citing the principal case. A general assignment by an insolvent debtor of his property to a trustee for the payment of his debts is not void on account of its providing for the payment of a usurious judgment, giving it priority over other debts, if it be in other respects free from objection: *Merritt v. Millard*, 5 Bosw. 651; *Merchants' E. N. Bank v. Commercial N. Co.*, 49 N. Y. 643, note; *Yardley v. New York G. & I. Co.*, 1 Flipp. 555, all citing the principal case. The maker of a general assignment for the benefit of creditors may lawfully include in it a usurious debt, and may direct the payment of such debt: *Berdan v. Sedgwick*, 44 N. Y. 30, citing the principal case.

DEBTOR MAY DECLINE TO SET UP STATUTE OF LIMITATIONS as a bar to a claim, without its being the slightest evidence of an intent to defraud creditors: *Thompson v. Sickles*, 46 Barb. 53, citing the principal case. See also note to *Crawford v. Taylor*, 28 Am. Dec. 585.

PARTY MAY WAIVE USURY, if he thinks proper to do so, and elect to affirm the contract: *Hartley v. Harrison*, 24 N. Y. 172, citing the principal case. And if the party injured by a usurious contract will not sue, there is no right of action available to any person in any court: *Boughton v. Smith*, 26 Barb. 640, citing the principal case.

PURCHASER TAKING TITLE SUBJECT TO USURIOUS MORTGAGE is estopped from questioning its validity: *Freeman v. Auld*, 44 N. Y. 53; *Kay v. Whitaker*, Id. 569, both citing the principal case.

PORTER v. WILLIAMS.

[9 NEW YORK (5 SELDEN), 142.]

APPOINTMENT OF RECEIVER IN SUPPLEMENTARY PROCEEDINGS, when completed, vests title to the debtor's effects, real as well as personal, without formal assignment.

RECEIVER APPOINTED IN SUPPLEMENTARY PROCEEDINGS may, as representing the creditors, sue to set aside an assignment, etc., made by the debtor, notwithstanding it may be obligatory on the debtor.

ASSIGNMENT FOR BENEFIT OF CREDITORS WHICH AUTHORIZES ASSIGNEE TO SELL ON CREDIT is void, and can not be rendered valid by any act or instrument of the grantor done or made after the rights of an objecting creditor have attached.

APPEAL from a judgment setting aside, in favor of a receiver appointed in supplementary proceedings, an assignment in trust for creditors. The facts appear from the opinion. The case in the supreme court is reported in 5 How. Pr. 441.

Martin Pechtcl, for the appellants.

John H. Reynolds, for the respondent.

By Court, WILLARD, J. The first question is, whether a receiver, appointed by a justice of the supreme court under supplementary proceedings instituted by a judgment creditor upon the return of executions unsatisfied, in pursuance of the provisions of the code of 1849, sections 292-298, can, after perfecting his appointment, maintain an action in his own name to set aside an assignment of real and personal property, made by the judgment debtor, on the ground of fraud, without having first received from such debtor an assignment to himself as such receiver.

By section 298 of the code of 1849 the receiver appointed under supplementary proceedings possesses the like authority as if the appointment were made by the court according to section 244. By the last-named section the court are authorized to appoint receivers and grant the other provisional remedies according to the then prevalent practice. The act of April 28, 1845 (Laws, 90, 91), enacts that any receiver appointed by virtue of an order or decree of the court of chancery may take and hold real estate upon such trusts and for such purposes as the court may direct, subject to the further order or direction of the court; and the second section empowers receivers so appointed by an order or decree of the court of chancery to sue in their own name for any debt, claim, or demand transferred to them, or to the possession or control of which they are entitled as such receivers. The chancellor, in *Wilson v. Wilson*, 1 Barb. Ch. 594, thought the act of 1845 was not broad enough to transfer the title of real estate to the receiver by the mere order of the court, and without an actual conveyance from the party to the suit in whom such legal title was vested. But I think that since the code no such conveyance is necessary to vest the legal title in the receiver, and that real and personal property are in this respect placed upon the same footing. The sections before cited provide for the appointment of receivers of the property of the judgment debtor, etc. Section 464 enacts that the term "property" as used in the code shall include "property real and personal," and sections 462 and 463 define what is meant by "real property" and

by "personal property." The first is declared to be co-extensive with lands, tenements, and hereditaments, and the other to include money, goods, chattels, things in action, and evidences of debt.

Before the code, it was settled that the order appointing a receiver, when the appointment was completed, vested in him all the property and effects of the debtor, subject to the order, without an assignment: *Mann v. Pentz*, 2 Sandf. Ch. 257; *Wilson v. Allen*, 6 Barb. 542. These cases speak only of personal property; and doubtless the real property did not before the code pass by such order, and was only directed to be conveyed under peculiar circumstances: *Scouton v. Bender*, 3 How. Pr. 185; *Chautauque County Bank v. White*, 6 Barb. 602, per Harris, J. But since the code, I think the order has the like effect upon the debtor's real estate as upon his personal estate, and that the whole by force of the order becomes vested in the receiver when the appointment is completed. The language of the code effectually removes the difficulty which the chancellor suggested in *Wilson v. Wilson*, *supra*. It puts real and personal property in the same category. The statute of frauds affords no objection to this view. It is there enacted, 2 R. S. 134, sec. 6, that no estate or interest in lands, etc., shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party, etc., or by his agent, etc. It was competent for the legislature to remove that impediment to conveyances, or to declare what act or operation of law should work a transfer of title. They seem to have done so by giving a legislative definition to the word "property," so as to embrace real as well as personal property.

The receiver appointed under supplementary proceedings does not stand merely in the place of the debtor, but represents the creditors, and can thus impeach the fraudulent sales of the debtor. The assignment sought to be set aside in this case was good between the parties. The fraudulent grantor could not impeach his own grant: *Osborne v. Moss*, 7 Johns. 161 [5 Am. Dec. 252]; *Jackson v. Garnsey*, 16 Id. 189; *Jackson v. Cadwell*, 1 Cow. 622; *Leach v. Kelsey*, 7 Barb. 466; *Jewett v. Palmer*, 7 Johns. Ch. 65 [11 Am. Dec. 401]; *Padgett v. Lawrence*, 10 Paige, 170 [40 Am. Dec. 232]; *De Mott v. Starkey*, 3 Barb. Ch. 403. But the receiver, succeeding to the rights of the debtor, represents other interests than those of the debtor. He comes in by the act of the law, and not by the act of the party. Before the

revised statutes it was held, in *Osborne v. Moss*, *supra*, that the personal representatives of the fraudulent grantor could not invalidate the grant; and the reason was, that the statute renders the sale void only as against creditors and purchasers, and leaves it valid between the parties and their representatives. But now, as remarked by Savage, C. J., in *Dox v. Backenstose*, 12 Wend. 543, under our statute executors and administrators have a new character, and stand in a different relation from what they formerly did to the creditors of the deceased persons with whose estates they are intrusted. They are not now the mere representatives of their testator or intestate. They are constituted trustees, and the property in their hands is a fund to be disposed of in the best manner for the benefit of creditors: See 2 R. S. 78, sec. 8; *Id.* 449, sec. 17, etc. The same doctrine was affirmed in *Babcock v. Booth*, 2 Hill (N. Y.), 181 [38 Am. Dec. 578], and was approved by the chancellor in *Brownell v. Curtis*, 10 Paige, 210-218. Since executors and administrators have come to represent the rights of the creditors generally, they have been allowed to impeach the conveyances of their testator or intestate, when fraudulent against creditors.

Upon the same principle the receiver of an insolvent corporation is allowed to question the fraudulent and illegal acts of the corporation. He represents both the creditors and the stockholders: *Gillet v. Moody*, 8 N. Y. 479; *Leavitt v. Palmer*, *Id.* 19 [51 Am. Dec. 833]; *Brouwer v. Hill*, 1 Sandf. 629; *Hyde v. Lynde*, 4 N. Y. 392. The receiver is bound by the legal acts of the corporation. It is only those which are illegal which he can impeach.

The receiver appointed under the code represents the interests of the creditors as well as those of the debtor. He is a trustee for all parties, and is bound to apply the effects of the debtor faithfully to the payment of the debts, according to their legal or equitable priorities; and if anything remains, to restore it to the debtor or his grantee. He has no power to set aside legal and valid acts of the debtor; but such as are illegal and forbidden by law he can successfully assail. These principles are legitimate deductions from the cases which have been cited, and they are carried out to their consequences in the code of 1851, section 298, which forbids the appointment of more than one receiver for the same judgment debtor, though there may separate proceedings in favor of different creditors. It shows that the receiver is a trustee for all.

The act which the receiver seeks to avoid in this case was an

illegal act of the debtor. The object of the action is to set aside an assignment made by the debtor with intent, as is alleged, to defraud the creditor under whose judgment and execution the plaintiff was appointed receiver, and the other creditors of the assignor. Such conveyance was void at common law, and is expressly forbidden by the statute: 2 R. S. 137, sec. 1. It is void as against the creditors of the party making it, though good as between him and his grantee. The plaintiff, representing the interests of the creditors, has a right to invoke the aid of the court to set aside the assignment. He stands in this respect in the same condition as the receiver of an insolvent corporation, or as an executor or administrator, and like them, can assail the illegal and fraudulent acts of the debtor whose estate he is appointed to administer.

These views are greatly strengthened by the recent decision of the court of appeals in the case of *Chautauque County Bank v. White*, 6 N. Y. 236 [57 Am. Dec. 442]. The supreme court in the third district (see S. C., 6 Barb. 589) held in that case, among other things, that a receiver in a creditor's suit could not take such a title in the real estate of the judgment debtor, even under an assignment made by the latter in pursuance of an order of the court, as to authorize the court to direct him to sell such real estate and apply the proceeds to the payment of the creditors having liens thereon; nor so to divest the judgment debtor of his title to the real estate as to prevent a judgment subsequently recovered against him from becoming a lien thereon. The court of appeals held the contrary on both those points. According to the decision of the supreme court, the real estate still remained in the debtor, notwithstanding the order appointing a receiver, and notwithstanding an actual conveyance by the debtor to the receiver, in pursuance of the order of the court. This judgment was reversed. The order appointing the receiver in that case was made before the code. The case is therefore in point to show that under the old practice the title passed to the receiver under an assignment made in pursuance of an order of the court. The argument in favor of its passing, since the code, is much stronger than it was before.

The assignment in this case was made by the defendant Williams to the defendant Clark on the fifth of January, 1850, in trust for the payment of the debts of the assignor according to an order of preference therein specified. It embraced all the real and personal property of the assignor, and it authorized the assignee "to sell and dispose of the same, either at public or

private sale, to such person or persons, for such price or prices, and on such terms and conditions, and either for cash or credit, as in the judgment of the assignee may appear best," etc. In *Barney v. Griffin*, 2 N. Y. 365, Bronson, J., in giving the opinion of this court, said that an assignment by an insolvent debtor of his estate is fraudulent and void when by the terms of the deed the trustees are authorized to sell the property on credit. It does not appear by the report that the whole court acquiesced in that position, and there were other grounds taken by the learned judge, and appearing on the face of that assignment, rendering it void, and upon which the other members of the court may have acted. This has led the superior court of New York to question the *dictum* of Judge Bronson. See *Nicholson v. Leavitt*, 4 Sandf. 293. But I understand this court in a subsequent case affirmed the principle above stated by Bronson, and that it is no longer an open question in this court. The assignment must therefore be set aside, unless the subsequent assignment made by the assignor on the thirtieth of March, 1850, cured the defect.

The subsequent assignment was made after the rights of the creditor had attached, and recited the assignment of the fifth of January, and that doubts had arisen whether the authority to sell on credit did not vitiate the assignment, and proceeded to direct that the sale should be for cash only. It is believed that the assignor had divested himself of all control over the property by the assignment of the fifth of January, and that he could neither revoke nor alter it; and certainly not to the prejudice of a creditor whose lien on the property had attached by the institution of supplementary proceedings under the code.

The judgment of the supreme court must be affirmed.

JOHNSON, J., gave no opinion.

Judgment affirmed.

RECEIVER, REAL AND PERSONAL PROPERTY VESTS IN, WHEN: See *Albany City Bank v. Schermerhorn*, 38 Am. Dec. 551, note 558, where other cases are collected. Before the adoption of the code, a receiver took no title to real property by the mere order of the court without a conveyance from the judgment debtor: *Scott v. Elmore*, 10 Hun, 71, citing the principal case. The order appointing the receiver now has the effect, without an assignment by the debtor, to divest his title and to vest it in the receiver: *Voorhees v. Seymour*, 26 Barb. 581; *Cooney v. Cooney*, 65 Id. 525; *Fessenden v. Woods*, 3 Bosw. 556, all citing the principal case. Property of the debtor situated in the state of New York, in a proceeding supplemental to execution, vests in the receiver by force of his appointment: *Fenner v. Sanborn*, 37 Barb. 613; *Higgins v. Wright*, 43 Id. 466; *Bostwick v. Menck*, 40 N. Y. 384; *Underwood v. Sutcliffe*, 77 Id. 62; all citing the principal case. The title of a receiver

commences from the filing of the order directing the appointment of a receiver, relating back to the date of that order, and overreaching all intermediate liens: *Clark v. Brockway*, 3 Keyes, 15; S. C., 1 Abb. App. Dec. 354; *People v. Mead*, 29 How. Pr. 366; *Clarke v. Goodridge*, 44 Id. 233; *Clan Renald v. Wyckoff*, 52 Id. 511; S. C., 41 N. Y. Superior Ct. 529; *Wing v. Disse*, 15 Hun, 194; *Van Alstyne v. Cook*, 25 N. Y. 496, all citing the principal case.

ASSIGNMENT CAN NOT BE INVALIDATED BY ANY ACTS OR OMISSIONS OF ASSIGNOR after the assignment has been executed and delivered and possession of the property taken by the assignee: *Hardman v. Bowen*, 5 Abb. Pr., N. S., 337; *Gates v. Andrews*, 37 N. Y. 659; *Hardmann v. Bowen*, 39 Id. 200, all citing the principal case.

RECEIVER REPRESENTS CREDITORS AS WELL AS JUDGMENT DEBTOR: *Palen v. Bushnell*, 18 Abb. Pr. 302; *Osgood v. Ogden*, 4 Keyes, 88; S. C., 3 Abb. App. Dec. 429; *McHarg v. Donnelly*, 27 Barb. 103, all citing the principal case. The receiver is a trustee for all parties, and is bound to apply the effects of the debtor faithfully to the payment of the debts: *Bostwick v. Beizer*, 10 Abb. Pr. 198; *Matter of Wilds*, 6 Abb. N. C. 310; *Kennedy v. Thorp*, 3 Abb. Pr., N. S., 134; S. C., 2 Daly, 260; *Cummings v. Egerton*, 9 Bosw. 635; *Donnelly v. West*, 17 Hun, 568; *Irving N. Bank v. Kernan*, 3 Redf. 6; *Coates v. Cunningham*, 80 Ill. 468, all citing the principal case.

RECEIVER CAN MAINTAIN ACTION TO SET ASIDE FRAUDULENT ASSIGNMENT: *Bennett v. McGuire*, 58 Barb. 635; S. C., 5 Lana. 187; *Brown v. Gilmore*, 16 How. Pr. 531; *Hayner v. James*, 17 N. Y. 333, all citing the principal case. And a receiver may maintain an action against the judgment debtor where he has converted the property after it has vested in the receiver: *Gardner v. Smith*, 29 Barb. 77; *Dollard v. Taylor*, 33 N. Y. Superior Ct. 498, both citing the principal case. Where a statute appointing a receiver authorizes him to sue in his own name, he may do so: *Manlove v. Burger*, 38 Ind. 212, citing the principal case. And where the appointment of a receiver of a corporation has been ratified by the legislature, the suit should be prosecuted in his own name unless some sufficient excuse is rendered, in which case such assignee should be made a party defendant: *Hightower v. Thornton*, 52 Am. Dec. 412.

THE PRINCIPAL CASE IS CITED in *Smith v. Howard*, 20 How. Pr. 126, to the point that assignors by the assignment place the property assigned beyond their control; in *Townsend v. Stearns*, 32 N. Y. 216, to the point that the cases in which assignments have been held illegal have been those in which the assignee was invested with absolute or discretionary powers, independent of and inconsistent with those resulting from the trust by operation of law; in *Livingstone v. Arnoux*, 15 Abb. Pr., N. S., 162, to the point that the fact that a debtor, by order of court, assigned to a receiver all his real estate does not deprive him of the power to redeem such real estate from a sale on execution against him; in *Juliand v. Rathbone*, 39 Barb. 102, to the point that the omission of an assignee to give bonds may furnish good cause for appointing a receiver; in *Darrow v. Lee*, 16 Abb. Pr. 217, to the point that it was never the practice in equity to entertain jurisdiction upon a creditor's bill, much less to appoint a receiver of the property of a judgment debtor, until an execution upon the judgment had been issued; and in *Foster v. Townshend*, 12 Abb. Pr., N. S., 471, to the point that much controversy has existed on the subject of the peculiar power of a receiver under a creditor's bill. The principal case was explained in *Moak v. Coats*, 33 Barb. 560, and in *Becker v. Torrance*, 31 N. Y. 639; and was distinguished in *Donnelly v. Shaw*, 7 Abb. N. C. 270.

HUTSON v. MAYOR ETC. OF NEW YORK CITY.

[9 NEW YORK (5 SELDEN), 163.]

MUNICIPAL CORPORATION, EMPOWERED THOUGH NOT COMMANDED BY STATUTE TO KEEP STREETS IN REPAIR, is liable in damages to a traveler who, without fault on his part, sustains injury from a defect in a public way which the proper officers have neglected to repair.

APPEAL from a judgment for damages for personal injuries sustained through falling into an excavation negligently left in a city street. The defense was that the city was not liable to travelers for default of its agents, contractors, etc., in keeping the streets in repair.

A. J. Willard, for the appellants.

Charles W. Sanford and Edwin W. Stoughton, for the respondents.

By Court, **MASON, J.** The simple question is presented in these cases whether the defendants, who have negligently suffered a public street in the city of New York to be and remain out of repair, are liable for damages sustained by the plaintiffs whilst carefully driving along such street, their carriage being upset, and the bad condition of the road being the sole cause of the injury thereby sustained. It is insisted on the part of the plaintiffs that the defendants are liable because it is their duty as a public municipal corporation to keep and maintain the streets of the city in proper repair; and secondly, upon the ground that if this should not be deemed a street in the strict sense of the term, within the meaning of the statutes in reference to the city of New York, yet that as the defendants as a corporation have been from a very early period commissioners of highways in and for that city, whose duty it is to keep and maintain the highways of the city in repair, and have accepted the city charter with all its franchises, the same duty was imposed upon them by the conditions of the charter.

It must, however, be considered as admitted by the pleadings that these injuries were received upon one of the public streets of the city. That this street at the place in question was subject to the control of the defendants as a municipal corporation must be conceded. The setting the curb and gutter-stones by the defendants was done in virtue of the power conferred by 2 R. L. 407, sec. 175, and in their municipal character. The defendants therefore possessed this extraordinary power, and over this street. They owned the fee of the land, and held it in

trust for the public as a street, with a franchise in themselves, conferred for public purposes, authorizing them to maintain and keep the same in repair, and to defray the expenses thereof by assessments upon the adjacent owners or occupants, or upon the lots themselves. It was that this might and should be done that these powers were conferred upon the defendants. It requires no argument to prove that it is the duty of the defendants to see that the public streets of this densely crowded city are kept in repair; for where a public body is clothed by statute with power to do an act which concerns the public interests, the execution of the power may be insisted on as a duty, though the statute conferring it be only permissive in terms: *Mayor etc. of New York v. Furze*, 3 Hill (N. Y.), 612.

It was held in this case that the corporation of the city of New York were bound to repair the sewers, basins, and culverts in the streets, constructed for carrying off the water, and that if an inhabitant be injured by reason of their neglect in this respect he may have his action against them for his damages. I am not able to distinguish that case from those under consideration. The liability in both cases rests upon one of the plainest principles of law. It is based upon the defendants' negligence in not performing a plain and absolute duty, in consequence of which the plaintiffs have received this injury. The case of *Furze* was decided more than ten years ago, and has ever since been regarded as the settled law in regard both to the defendants' duty and liability in reference to the public streets of that city. The case of *Adsit v. Brady*, 4 Id. 630 [40 Am. Dec. 305], is the same in principle. It is declared in that case that when an individual sustains an injury by the misfeasance or non-feasance of a public officer, who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case. It was held in that case that a superintendent of repairs rendered himself liable to persons sustaining damage in consequence of a sunken boat, obstructing the navigation of the canal, being suffered to remain there by the superintendent; that the statute made the duty of the superintendent to keep his section of the canal in proper repair, and that for neglect to perform that duty the law rendered him liable to an action in behalf of an aggrieved party. The duties of this corporation in regard to keeping the streets and sewers of the city in repair are both prescribed in the same section: Laws of 1813, p. 407, sec. 175. Although its language is that of permission and not of command, yet in its nature it is plainly

imperative: *Mayor etc. of New York v. Furze, supra; Wilson v. Mayor of New York*, 1 Denio, 601 [43 Am. Dec. 719]. In the latter case, the court say it is equivalent to an express enactment that it shall be the duty of the mayor, aldermen, etc., to make all needful sewers, etc. They add that, admitting that there is a discretion confided to them in regard to constructing drains and sewers in the first instance, yet when they have constructed them, the duty is imperative to keep them in repair. This court has recognized the liability of municipal corporations in such cases in *Rochester White Lead Co. v. City of Rochester*, 3 N. Y. 464 [53 Am. Dec. 316], in which it is affirmed that where a duty purely ministerial is violated or negligently performed by a municipal corporation, the party aggrieved may have redress by action; and the defendants in that case were held liable for negligence in the construction of a culvert. There can be no difference in their liability for negligence in constructing it and for negligence in not keeping it in repair. The liability in both cases rests upon the omission to perform a plain duty.

It would be a waste of time to examine all the cases referred to by the court below and the counsel upon the argument. Many of them have little to do with the question. There is a class of cases in which both public officers and public bodies have been held not to be liable for an omission to keep highways in repair. They are cases, however, where the powers have been so limited to accomplish the object that the courts have considered their duty resting in too much doubt to render them liable, or that the duty was not imposed at all, by an omission to give them the means necessary to accomplish the object. The cases under consideration are free from any such difficulty. The defendants, as we have shown, are possessed of the most complete powers in this respect.

I am clearly of the opinion that the judgment of the court below is right, and should be affirmed.

TAGGART, J., dissented from the foregoing conclusions.

All the other judges concurred.

Judgment affirmed.

LIABILITY OF MUNICIPAL CORPORATION FOR INJURIES RESULTING FROM ITS NEGLIGENCE OR OMISSION: See *Lloyd v. Mayor etc. of New York*, 55 Am. Dec. 347, note 349, where other cases are collected: *City of Madison v. Ross*, 54 Id. 481, note 483; *Rochester W. L. Co. v. Rochester*, 53 Id. 316, note 320; *Raymond v. City of Lowell*, Id. 57, note 67; *Radcliff v. Mayor etc. of Brook-*

lyn, Id. 357, note 367, where other cases are collected. Municipal corporations are bound to keep their streets and avenues in such repair that they may be safely traveled when they are opened for public use, and if they negligently suffer them to get out of repair, they are liable for any injuries that may happen to persons through such negligence: *Wallace v. Mayor etc. of New York*, 9 Abb. Pr. 43; S. C., 2 Hilt. 450; S. C., 18 How. Pr. 174; *Wolfe v. Supervisors of Richmond*, 11 Abb. Pr. 272; S. C., 19 How. Pr. 372; *Davenport v. Ruckman*, 16 Abb. Pr. 345; *Baldwin v. City of Oswego*, 1 Abb. App. Dec. 74; S. C., 2 Keyes, 143; *Hume v. Mayor etc. of New York*, 57 How. Pr. 365; *Deyoe v. Village of Saratoga Springs*, 1 Hun, 343; S. C., 3 Thomp. & C. 505; *Wilson v. City of Watertown*, 3 Hun, 512; S. C., 5 Thomp. & C. 581; *Diveny v. City of Elmira*, 51 N. Y. 513; *Clemence v. City of Auburn*, 66 Id. 341; *Hume v. Mayor etc. of New York*, 74 Id. 270; *Browning v. City of Springfield*, 17 Ill. 145; *Town of Waltham v. Kemper*, 55 Id. 351; *Hill v. Boston*, 122 Mass. 376; *Weightman v. Corporation of Washington*, 1 Black, 53; *Water Co. v. Ware*, 16 Wall. 574, all citing the principal case. It is the duty of a municipal corporation to construct and maintain its sewers and drains with such care and prudence as a discreet and cautious person would use if the whole loss or risk was to be his own; and it is liable for loss and damage resulting from the want of such care and prudence: *Barton v. City of Syracuse*, 37 Barb. 296; S. C. on appeal, 36 N. Y. 55, citing the principal case. Where municipal corporations or individuals are charged, as in the case of streets, highways, or bridges, with the duty of keeping them in repair and of exercising a general oversight in regard to their condition and safety, they or the body they represent are liable for all injuries happening by reason of their negligence: *Wendell v. Mayor etc. of Troy*, 39 Barb. 335; *Hyatt v. Trustees of Rondout*, 44 Id. 394; *Mott v. Hudson R. R. Co.*, 8 Bosw. 353; *Mott v. Mayor etc. of New York*, 2 Hilt. 364; *Conrad v. Trustees of Ithaca*, 16 N. Y. 173, all citing the principal case.

IT IS DUTY OF MUNICIPAL CORPORATION TO KEEP ITS STREETS IN PROPER REPAIR and in a safe condition for the use of the public: *Garrison v. Mayor etc. of N. Y.*, 5 Bosw. 505, in the dissenting opinion of Woodruff, J.; *Davenport v. Ruckman*, 10 Id. 28; S. C. on appeal, 37 N. Y. 572, both citing the principal case. And when a public body is clothed with power to do an act which the public interest requires to be done, and the means of performance are placed at its disposal, the execution of the power may be insisted on as a duty, notwithstanding the statute conferring it is only permissive: *Hines v. City of Lockport*, 6 Barb. 384; S. C., 41 How. Pr. 449; S. C., 5 Lans. 21; *Haskell v. Village of Penn Yan*, 5 Lans. 51; *Requa v. City of Rochester*, 45 N. Y. 134; *Harlem Gaslight Co. v. Mayor etc. of N. Y.*, 3 Robt. 117, all citing the principal case.

WHERE INDIVIDUAL SUSTAINS INJURY BY REASON OF MISFEASANCE or non-feasance of a public officer who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case: *Hoover v. Barkhoof*, 44 N. Y. 123; *McCarthy v. City of Syracuse*, 46 Id. 196, both citing the principal case.

THE PRINCIPAL CASE IS CITED in *Hagadorn v. Raux*, 72 N. Y. 586, to the point that whenever a positive duty, as distinguished from a discretionary power is intended to be imposed, "may" is to be construed "must;" and in *Hume v. Mayor etc. of N. Y.*, 9 Hun, 685, to the point that notice, actual or constructive, of the existence of obstructions in public streets must be given before a municipal corporation can be held liable for personal injuries sus-

tained by reason thereof. It is also distinguished in the following cases. *Hickok v. Trustees of Plattsburgh*, 15 Barb. 443; *Griffin v. Mayor etc. of N. Y.*, 9 N. Y. 457; *Mills v. City of Brooklyn*, 32 Id. 500; and criticised in *Detroit v. Blackeby*, 21 Mich. 110.

GATES v. BROWER.

[9 NEW YORK (5 SELDEN), 205.]

MARRIED WOMAN'S GIVING HER OWN NOTE FOR PRICE OF SUPPLIES bought by her for her husband's farm is not conclusive evidence that the indebtedness was incurred by her individually; the questions of her agency and her husband's liability are for the jury.

APPEAL from a judgment dismissing a complaint for the price of horses sold and delivered. The circumstances attending the purchase appear from the opinion. The cause was submitted.

N. F. Graves, for the appellant.

Vandenburgh and Woolworth, for the respondent.

By Court, MASON, J. I think there was evidence in this case which should have been submitted to the jury to determine whether these horses were not in fact purchased by the wife acting in behalf of the defendant, and whether the purchase was not in fact his. There was evidence in the case from which a jury might justly have found such to be the case. There was evidence that Mrs. Brower acted as the agent of her husband, and of her authority so to act. She had for years generally transacted the mercantile business of the family, and had before given her note, which was taken up by the defendant. She seems to have conducted the law business for her husband. She seems to have had a general supervision of the defendant's farm, and usually directed in regard to its management; and she was in the habit of doing all these things with the defendant's assent, express or implied. He knew of the purchase of these horses and made no objections to it, but on the contrary, I think, ratified the purchase. The horses were used as a team on his farm, and he and his boys used them. All this was certainly very strong evidence to submit to a jury upon the question of the wife's agency and of the defendant's ratification thereof, and should have been so submitted. The husband is bound by the wife's contracts in such cases from a presumed assent to the purchase: 2 Kent's Com. 146. It is upon this principle that he is bound by such contracts of his wife respecting those matters about which it has been usual for her

to contract and for him to sanction: Reeve's Dom. Rel. 79. This is upon the same ground that he would be bound if his servant had contracted for him. The liability proceeds upon the ground that he has constituted his wife his agent in the transaction: Bac. Abr., tit. Baron and Feme, H and I; Reeve's Dom. Rel. 79; *Ela v. Card*, 2 N. H. 176 [9 Am. Dec. 46]; *Fenner v. Lewis*, 10 Johns. 38; *Petty v. Anderson*, 3 Bing. 170; *Riley v. Suydam*, 4 Barb. 222; *Lovett v. Robinson*, 7 How. Pr. 106. It was held in the case of *Petty v. Anderson*, *supra*, that the husband was liable for articles furnished the wife where she was carrying on business in her name with his knowledge, though the invoices and receipts were in the name of the wife, and although she was rated for and paid the poor and paving rates.

The same, precisely, is the case of *Lovett v. Robinson*, 7 How. Pr. 105, where Judge Willard held the husband liable. The wife may not only act as the agent of her husband, but any subsequent acknowledgment or ratification of her acts by the husband is evidence of and equivalent to an original authority: *Hopkins v. Mollinieux*, 4 Wend. 465; *Riley v. Suydam*, 4 Barb. 222; Bac. Abr., tit. Baron and Feme, H; and it is said he tacitly ratifies and adopts her acts, when having received the goods she has purchased he does not return them: *Waithman v. Wakefield*, 1 Camp. 120; Bac. Abr., tit. Baron and Feme, H. And it is said in books of every high authority that if there is any evidence to show an assent of the husband, it is a question for the jury to determine whether the debt was or was not contracted under his assent: *Id.* The fact that the plaintiff took the note of the wife on the sale of these horses does not furnish such conclusive evidence that the purchase was not in fact for the benefit of the husband as to be incapable of being overcome by the other evidence in the case: *White v. Cuyler*, 6 T. R. 176.

The acts of 1848 and 1849, in regard to the rights of married women, do not in any manner affect this case.

The judgment of the court below ought to be reversed, and a new trial granted.

All the judges concurred in the above conclusions.

Judgment reversed and new trial ordered.

POWER OF WIFE TO BIND HUSBAND BY CONTRACTS: See *Johnson v. Williams*, 54 Am. Dec. 491, note 493; *Casteel v. Casteel*, 44 Id. 763, note 766; *Felker v. Emerson*, 42 Id. 532, note 533; *Green v. Sperry*, Id. 519, note 520;

Benjamin v. Benjamin, 39 Id. 384, note 391; *Mackinley v. McGregor*, 31 Id. 522, note 535.

IF MARRIED WOMAN PURCHASES PERSONAL PROPERTY FOR HER HUSBAND'S USE, and the same is received by him and used, he will be liable for the property; but if in such case she gives a note in her own name, the action will lie not upon the note, but for the consideration of the note, as for goods sold to the husband: *Galusha v. Hitchcock*, 29 Barb. 195, citing the principal case. A husband is liable for any debt contracted or obligation incurred by his wife with his assent, express or implied: *Morgan v. Andriot*, 2 Hilt. 433; S. C., 18 How. Pr. 372, citing the principal case. Where money belonging to the husband is given by the wife to a third person to be by him applied to a particular use, the wife is regarded as the agent of the husband in the transaction, and the party to whom the money was given will be accountable for it to the husband and not to the wife: *Brouer v. Vandenburg*, 31 Barb. 649, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Griffin v. Banks*, 37 N. Y. 623.

EDGEELL v. HART.

[9 NEW YORK (5 SELDEN), 213.]

CHATTEL MORTGAGE ON STOCK OF GOODS IN MORTGAGOR'S STORE, which purports to reserve a right in the mortgagor to sell and deliver (except on credit) from time to time, and to replace the goods delivered with others, is void on its face for fraud towards other creditors.

APPEAL from a judgment of nonsuit in an action to recover back goods which the plaintiff claimed as mortgagee, but which the defendant had seized on executions against the plaintiff's mortgagor. The defense was, that the mortgage was fraudulent and void for allowing the mortgagor to make sales of the goods, and supply the place of those sold. The cause was submitted.

E. Darwin Smith, for the appellant.

J. L. Angle, for the respondent.

By Court, DENIO, J. The schedule annexed to the mortgage, and referred to in it, was a part of that instrument; and both papers are to be construed together: *Roberts v. Chenango Mut. Ins. Co.*, 3 Hill (N. Y.), 501; *Hills v. Miller*, 8 Paige, 254, 256 [24 Am. Dec. 218], and cases cited; Phill. Ev., Cowen & Hill's notes, 1420, note 958.

The inhibition to sell on credit contained in the writing at the foot of the schedule by a necessary implication authorized Bostwick to sell the goods for cash, and all the circumstances connected with the transaction, as well as the admission of the pleadings, show that the intention of the instrument was that Bostwick should continue to retail the mortgaged property and

receive the proceeds to his own use, as he had done with the plaintiff's knowledge and assent from the time of the original purchase and the giving of the first mortgage.

Interpreting the instrument in this manner, the scope of the written arrangement between the parties was that Bostwick should carry on a retail store, making purchases from time to time, and selling off in the ordinary manner, the plaintiff all the time retaining a lien on the whole stock by way of mortgage, under which he could upon a default take possession of the remaining goods, whether they were those owned by Bostwick at the giving of the mortgage or purchased subsequently, and sell them for the payment of his debt. I have said that this was the written arrangement between the parties, and not merely their supposed intention deduced from circumstantial proof. They made this precise bargain in writing, and the question is whether by law such an arrangement is void as against creditors. The appellant's counsel strenuously contends that inasmuch as the statute has declared that the question of fraudulent intent shall be deemed a question of fact and not of law, 2 R. S. 137, sec. 4, the effect of the mortgage should have been left to the jury. It should be remembered that there is no question respecting the meaning of the language. The doubt, if there be one, is whether the law tolerates such an arrangement where the rights of creditors are concerned. There was no traversible question either respecting the intention of the parties. The law adjudges that they intended what the writing expresses; and it would be incompetent for either party to show, if they were possessed of the most persuasive evidence, that they designed the instrument to have a different operation from the one the law assigns to it.

As it is the duty of the court to respond as to the law, and as this was a pure question of law, it belonged to the judge at the circuit to determine whether an action could be sustained on this mortgage. If by law it was void as to creditors, the court would be obliged to set aside a verdict affirming its validity as often as one should be rendered. The true question, then, is, whether a person engaged in traffic and indebted can make a valid contract or conveyance in favor of one creditor, by which he shall possess a lien upon all the chattels which the debtor shall from time to time have on hand, allowing the latter to sell and purchase like an unqualified owner, the lien attaching only to what may be on hand at the time it is sought to be enforced. The proposition requires only to be stated to be

refuted. The branch of it which professes to subject after-purchased property is void upon the most common principles. A mortgage is an executed conveyance subject to a condition, and has all the elements of a sale. Like a sale, it requires a subject in esse and in the power of the mortgagor: 2 Bouv. Law Dict. 485, pl. 1, 2, 3, 6; Blackb. on Sales, 122; *Rapelye v. Mackie*, 6 Cow. 250; *Outwater v. Dodge*, 7 Id. 85. The appellant's counsel concedes that the instrument was inoperative upon after-acquired property; but he argues that this consideration does not affect it in respect to that which was on hand when it was executed. But it seems to me that its prospective operation was an essential part of the entire arrangement. It was not intended to create an absolute lien upon any property, but a fluctuating one, which should open to release that which should be sold, and to take in what should be newly purchased. It may be safely assumed that the liberty to sell would not have been given but for the right supposed to be acquired over subsequent purchases. But I am of opinion that the right to sell, if it stood alone, would vitiate the mortgage. In *Griswold v. Sheldon*, 4 N. Y. 581, 594, five judges of this court concurred in holding that such a provision would render the instrument void, and four were of opinion that where the mortgagor was allowed by the mortgagee to sell the mortgaged chattels, though not in pursuance of a provision in the instrument, the mortgage would be invalid in law, whatever a jury might think of it. The invalidity of such a transaction had been affirmed in the supreme court in *Wood v. Lowry*, 17 Wend. 492, and no case or dictum has been found to uphold it.

I not only agree that the case of *Smith v. Acker*, 23 Wend. 658, is an authoritative exposition of the statute respecting fraudulent sales, but I assent to it *ex animo* as asserting the true sense of the legislature. The effect of that decision I understand to be, that where the objection to a sale or mortgage of chattels is that the vendor or mortgagor continues in possession, the transfer, though *prima facie* fraudulent, is susceptible of explanation by proof that it was intrinsically honest and made without a view to defraud creditors. This explanation relates to the consideration and motives of the transfer, and is not limited to accounting for the want of change of possession; and it is moreover to be submitted to a jury in all cases where it arises upon the trial of an issue of fact. But this falls far short of proving that no transfer of chattels can be fraudulent and void in law as against creditors, and still further from showing that a jury is in such cases

to take the place of the court in determining the effect of written instruments. A deed of gift by a person indebted would, I presume, be void as against creditors as a matter of law, as well since as before the statute; and so also of a conveyance of chattels which like the mortgage should leave the owner the right of selling them as his own. These considerations are sufficient to enable us to decide the case in favor of the respondent; and it is unnecessary to determine whether a nonsuit would be proper, if the right of the mortgagor to sell had been made out by the conduct of the parties or their declarations out of the mortgage. My own opinion is, that the existence of such a provision out of the mortgage or in it would invalidate it as matter of law, and that where the facts are undisputed, this court should so declare. The manifest tendency of such arrangements to defraud creditors by giving to the mortgagor a false credit, and their incongruity with the just and legal idea of a mortgage, are in my mind sufficient to condemn them; but as before remarked, it is only necessary now to decide that in this case, the objectionable provision being contained in the mortgage, the nonsuit was proper.

The judgment of the court below should be affirmed.

GARDINER, MASON, and JOHNSON, JJ., dissented.

Judgment affirmed.

LEAVING PROPERTY MORTGAGED IN POSSESSION OF MORTGAGOR, from motives of kindness on the part of the mortgagee, and to enable the mortgagor to make money and pay his debts, was held, in *Bumpas v. Dotson*, 46 Am. Dec. 81, not to render the mortgage fraudulent. And in *Briggs v. Parkman*, 37 Id. 89, it was decided that a mortgage of a trader's stock of goods is not fraudulent *per se*, although it provides that the mortgagor may retain possession, and make sales in the usual course of business, applying the proceeds thereof to his own use, where he at the same time promises, if he should make large sales, to replace the goods so sold, and where the property mortgaged is more than sufficient to pay the debt. The presumption of fraud arising from such a transaction may be repelled by satisfactory evidence. And see note to that case, where other cases are cited. But in New York it is well settled that where it is provided in a mortgage upon chattels, either in express terms or by necessary implication, that the mortgagor shall not merely continue in possession but that he may continue to retail the mortgaged property and receive the proceeds to his own use, the mortgage is fraudulent and void as against creditors, and it is the duty of the court so to declare: *Marston v. Vultee*, 18 Bosw. 131; S. C., 12 Abb. Pr. 144; *Mittnacht v. Kelly*, 3 Keyes, 408; S. C., 3 Abb. App. Dec. 302; S. C., 5 Abb. Pr., N. S., 445; S. C., 46 How. Pr. 458; *Russell v. Winne*, 37 N. Y. 595; S. C., 4 Abb. Pr., N. S., 388; *Yates v. Olmsted*, 65 Barb. 46; *Brown v. Platt*, 8 Bosw. 330; *Dutcher v. Swartwood*, 15 Hun, 33; *Carpenter v. Simmons*, 1 Robt. 374; S. C., 28 How. Pr. 17; *Bainbridge v. Richmond*, 17 Hun, 393; *Gardner v.*

McEwen, 19 N. Y. 126; *Conkling v. Shelley*, 28 Id. 362; *Miller v. Lockwood*, 32 Id. 304; *Frost v. Warren*, in the dissenting opinion of Grover, J., 42 Id. 208; *Southart v. Benner*, 72 Id. 432; *Davis v. Ransom*, 18 Ill. 402; *Simmons v. Jenkins*, 76 Id. 483; *In re Kahley*, 2 Biss. 387; *Hawkins v. Hastings Bank*, 1 Dill. 464, all citing the principal case. See also note to *Pulcifer v. Page*, 54 Am. Dec. 595.

THE PRINCIPAL CASE IS CITED in *Caines v. Platt*, 33 How. Pr. 105; S. C., 7 Abb. Pr., N. S., 48; S. C., 1 Sweeny, 147; and in *Dodds v. Johnson*, 3 Thomp. & C. 218, to the point that where the conveyance under which the plaintiff claims appears on its face to be fraudulent, it is the duty of the court to nonsuit; in *Kavanagh v. Beckwith*, 44 Barb. 195, to the point that where an assignment is shown by extrinsic facts, without dispute or explanation, to be necessarily fraudulent, in such a case, if, against the evidence, a referee or jury finds no fraud, it will be the duty of the court to set aside the finding; in *Clark v. Wise*, 57 Barb. 419; S. C., 39 How. Pr. 100, to the point that where a transfer is in writing, and the terms of it will admit of but one interpretation, and that a fraudulent one, the court may pronounce the transfer fraudulent as a question of law; in *Ford v. Williams*, 24 N. Y. 364, to the point that the question as to the effect of a written instrument is a question of law for the court; in *Allen v. Cowan*, 28 Barb. 106, to the point that where the mortgagor of chattels remains in possession thereof, as between one claiming under the mortgage and one representing a judgment creditor of the mortgagor, some evidence that the mortgage was made in good faith is required, and if no such evidence is produced, the conclusive statutory presumption of fraud stands in the way of a recovery by the claimant, and the court should nonsuit him; and in *Wood v. Lester*, 29 Id. 154, to the point that an agreement for a lien on wood to be cut is neither a chattel mortgage nor a sale of chattels, because the subject-matter of the lien is not in existence as personal property.

PEOPLE v. STURTEVANT.

[9 NEW YORK (5 SELDEN), 263.]

JURISDICTION EXISTS, IN SUCH SENSE AS TO RENDER INJUNCTION OBLIGATORY, when the court granting it has authority to decide whether the application for it shall be granted; it does not depend on the correctness of the decision.

ERROR IN DECISION GRANTING INJUNCTION CAN NOT BE ASSIGNED AS EXCUSE for disobeying it; the order, if within the power of the court, must be obeyed until vacated or reversed.

COURTS OF EQUITY HAVE GENERAL JURISDICTION TO GRANT INJUNCTIONS to restrain public nuisances.

JURISDICTION OF NEW YORK SUPERIOR COURT UNDER CODE OF PROCEDURE as existing in 1852-3, to enjoin the municipal officers from granting the use of a city street for a railroad, explained.

GRANT OF FRANCHISE OR LICENSE TO LAY RAILROAD TRACKS and run cars in a city is not an act of legislative power of the mayor and common council such as is exempt from judicial control; but may, in a proper case, be restrained by a court of competent jurisdiction.

INJUNCTION ADDRESSED TO MAYOR, ALDERMEN, AND COMMONALTY OF CITY, duly served on the proper officers of the corporation, is obligatory upon all officers and agents of the city having knowledge of it, in such sense that any of them taking part in a violation may be individually punished for contempt, though he was not individually a party to the injunction suit.

APPEAL from a judgment affirming a sentence for contempt of court. The general facts were, that a project having been formed to lay a horse-railroad in Broadway, it was opposed by A. T. Stewart and others, property owners on the street. They brought suit in the superior court of the city of New York against the mayor, aldermen, etc., of the city, praying an injunction restraining them from making the grant which the railroad corporation requested and had prepared. An injunction was granted and served; nevertheless, members of the common council, taking the ground that their votes in meetings of the council were legislative action which the courts had no authority to control, voted for a resolution making the grant, in numbers sufficient to pass it. Proceedings were then instituted in the superior court to punish them for contempt in thus voting; and the court adjudged the act of so voting a contempt, and imposed punishment of fine and imprisonment. From this order the present appeal was taken. The litigation below is reported in *Davis v. Mayor etc. of New York*, 1 Duer, 451; *People v. Compton*, Id. 512; *People v. Sturtevant*, Id. 571, note.

David Dudley Field and Charles O'Connor, for the appellants.

John Van Buren, for the respondents.

By Court, JOHNSON, J. The first question to be considered is, Did the injunction impose any obligation upon anybody? The answer must depend upon the solution of the further question, whether the superior court had jurisdiction of the action in which it was ordered to be issued; because the principle is of universal force, that the order or judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous. The method of correcting error is by appeal, and not by disobedience. A party proceeded against for disobedience to an order or judgment is never allowed to allege as a defense for his misconduct that the court erred in its judgment. He must go further, and make out that in point of law there was no order and no disobedience, by showing that the court had no right to judge between the parties upon the subject. The point has been held over and over again in reference to the

very case of disobedience to injunctions: *Deklyn v. Davis*, Hopk. Ch. 135; *Sullivan v. Judah*, 4 Paige, 444; *Russell v. East Anglian Railway Co.*, 1 Eng. L. & Eq. 101, 106; *Glascott v. Lang*, 3 Myl. & C. 452; and is well stated in general terms in *Wilcox v. Jackson*, 13 Pet. 511. "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void."

To enable us to proceed to say whether the superior court had jurisdiction, and whether, consequently, its injunction in *Davis v. Mayor etc. of New York*, 1 Duer, 451, was void or not, it will be convenient to recur to some almost elementary notions upon the subject. In *State of Rhode Island v. State of Massachusetts*, 12 Pet. 718, Mr. Justice Baldwin, delivering the opinion of the majority of the supreme court of the United States, says: "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate, or exercise any judicial power over them; the question is, whether on the case before a court their action is judicial or extrajudicial; with or without the authority of law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it." See also *Grignon v. Astor*, 2 How. 338. This, I apprehend, points to the true line of inquiry to determine the question of jurisdiction. We are not called upon to say whether the court decided right or not in granting the injunction, but whether it became their duty to decide either that it should be granted or denied. If such was their duty, then they had jurisdiction, and their decision, be it correct or erroneous, is the law of the case until it shall be reversed upon appeal; and can only be questioned upon a direct proceeding to review it, and not collaterally.

Now, it is not nor can it be denied that Davis and Palmer had a right to sue in the superior court, nor that the mayor, aldermen, and commonalty of the city of New York might be sued in that court; and it is equally clear that Davis and Palmer did, by summons and complaint, institute a suit against them there. So far, therefore, as the parties were concerned, there would seem to be no difficulty in respect to sustaining the jurisdiction.

Then, how is it as to subject-matter? The jurisdiction of the superior court depends upon section 33 of the code of procedure. This declares, so far as it can possibly bear upon this case, that it shall extend to the following actions, viz.: 1. To those specified in sections 123 and 124, when the cause of action shall have arisen, or the subject of the action shall be situated within the city of New York; 2. To all other actions where all the defendants shall reside or be personally served with the summons within the city; and 3. To actions against corporations created under the laws of this state, and transacting their general business, or keeping an office for the transaction of business within the city, or established by law therein. The only action specified in sections 123 and 124 which can possibly be deemed to include the suit of *Davis v. Mayor etc. of New York, supra*, are described in the first subdivision of section 123 as being "for the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property." Now, under whichever of these heads of jurisdiction this case comes—and it is at any rate comprised under that which relates to actions against corporations—its subject-matter can not be any more out of the jurisdiction of the superior court than it is out of that of every other court. Its jurisdiction is not made to depend upon the subject-matter of the suit, except in respect to those cases which come under the first subdivision; and as to those, the test of jurisdiction in the superior court is whether the case arose or the subject is situated in the city of New York; and if this action should be thought to come under that subdivision, then clearly the cause arose or its subject is situated within the city, and so the case is within the jurisdiction of the court.

Under the second and third subdivisions of section 33, so far as they bear upon this case (and so far they have been stated above), jurisdiction is made to depend in the second subdivision upon the residence of the defendant or the service of the summons within the city; and in the third, upon the character and locality of the corporation defendant. In all other respects the jurisdiction is as wide as the definition of an action under the code, and that is defined to be "an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

The subject-matter of the suit of *Davis v. Mayor etc. of New York, supra*, to state it in the most general way, is an alleged

public nuisance about to be perpetrated under the authorization of the defendants, by the building of a railway in Broadway; and the relief demanded is, that the defendants should be restrained from granting that authority. There seems, therefore, to be no ground upon which this case can be said to be out of the jurisdiction of the superior court which would not apply with equal force to any other court not having jurisdiction of what the code calls criminal actions.

Now the cases show abundantly that courts of equity possessed jurisdiction in respect to public nuisances, and exercised it by restraining them in certain cases; in others, by refusing to interfere: *Attorney General v. Johnson*, 2 Wils. Ch. 87; *Spencer v. London and Birmingham Railway*, 8 Sim. 193; 2 Story's Eq. Jur., secs. 920-938, and cases there cited. The subject itself was within their jurisdiction. What judicial action should be had upon that subject was matter of equity, determinable according to the circumstances which each case presented. Whether relief was granted or denied, the decision was judicial, and grounded upon a jurisdiction in the court to act upon the subject-matter.

Jurisdiction does not relate to the right of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in any one else. The case we are considering illustrates the distinction I am endeavoring to point out, as well as any supposed case would. It presents these questions: Have the plaintiffs shown a right to the relief which they seek? And has the court authority to determine whether or not they have shown such a right? A wrong determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction. It is that alone with which we now have anything to do. Whether the plaintiffs are the proper persons to maintain the suit, or whether the attorney general should have brought it, or whether the facts show a right in either to have a decree in their favor, are questions which we are not in this proceeding called upon to consider. They relate to the equity of the claim, and not to the power of the court. We are entirely satisfied that the decree of a court of equity restraining a public nuisance

is not void, even though the attorney general be not plaintiff, and though no special injury to the actual plaintiff is averred. It is quite possible that such a decree would be erroneous, perhaps even very clearly wrong, but it would not be void; and the party who was dissatisfied with it would be compelled to seek his remedy by an appeal, and not by setting at defiance the authority of the court.

The terms of the injunction, as we have already seen, forbid the granting to certain persons named in the resolution, a copy of which was annexed to the complaint, or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a railway track in Broadway, or in any manner authorizing them so to do.

The complaint alleges that the establishment of this railway in Broadway would be a nuisance. The injunction, therefore, upon its face, is only such as we have already concluded the court had jurisdiction to order.

The act which is complained of as a violation of the injunction is the adoption by the common council of the resolution referred to; and the participation of the defendant Sturtevant in that act, by voting in favor of the resolution as a member of the board of aldermen, is relied upon as rendering him liable to punishment therefor.

The terms of the injunction which forbid the granting or in any manner authorizing the persons named to lay the railway, addressed as its restraining words are to "the mayor, aldermen, and commonalty of the city of New York, their counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of them, and each and every of them," are certainly broad enough to include every mode of action of which the corporation was capable, and every agency which it could employ to effect the forbidden thing. Now, the adoption of the resolution in question by the common council was one mode of making the grant or authorization forbidden by the injunction. The resolution had previously been passed by both boards, and had been vetoed and returned by the mayor to the board of aldermen. It is upon its face a complete authority, so that no further act on the part of the city, save that of its adoption, was necessary in order to impose an obligation upon the city, and to confer upon the parties named in it a right to construct a railway in Broadway. Its words are: "Resolved, that Jacob Sharp, etc., have the authority and consent of the common council to lay a double track for a railway in Broadway," etc.; "the

said grant of permission and authority being upon and with the following conditions and stipulations."

Then follow regulations arranged under fifteen heads, providing for the mode of building and employing the road, the rates of fare and the compensation to the city, the organization of the grantees into a company, and in the last place providing as follows: "The associates whose names are set forth in this resolution shall, by writing filed with the clerk of the common council, signify their acceptance thereof, and agree to conform thereto," etc. It was contended upon this last provision, that until acceptance signified by the associates the resolution did not become an effectual grant, and therefore was no violation of the command of the injunction. This I can not agree to. The injunction is pointed at the acts of the mayor, aldermen, and commonalty of the city, and when it restrains them from granting, it would be giving the command an absurd construction so to read it as that no act of theirs could violate it. Such is the construction contended for. Every grant is inoperative and incomplete until acceptance, express or implied, by the grantee. The common council did all they could do, and all that was in any event to be done by them, towards making the grant effectual. If they had not then violated the injunction, they never could have violated it.

The language of an injunction, like that of all other instruments, must have a reasonable construction with reference to the subject about which it is employed. If one be forbidden to do an act which he alone can not completely perform, the prohibition will be intended to be good at all events to the extent within which it is in his power to violate it. A prohibition to grant has reference merely to the act of the grantor, and in the common usage of the words would unquestionably be understood to relate to his act of granting, and not to the grantee's acceptance. I can not, therefore, entertain any doubt that the mandate of the court did forbid the act which has been adjudged to be a violation of it, nor that the act of the defendant in voting for the resolution made him a participator in that violation.

Another question has been raised by the appellant, to the consideration of which the question just discussed naturally leads us, and which, although of the same nature as the objection to the jurisdiction of the court first considered, could not so conveniently be examined until we had in the first place ascertained what was the actual import of the terms employed in the injunction, and whether they were such as to forbid the defendant, as

a member of the board of aldermen, to vote for the resolution or grant in question.

The appellant's proposition is, that the court had no power to restrain his vote upon the resolution, its adoption being, as he contends, an act of legislation by the common council, and, as such, beyond the control of all courts. Thus far, at least, the appellant must carry the doctrine, for if it stop short of the point of a want of power, the question relates merely to the propriety, or correctness in point of law, of the actual determination, and not to the existence of the power of determining. In that case, as we have already seen, we upon this proceeding have nothing to do with the correctness of the decision granting the injunction; nor had the superior court, except in so far as the propriety of the original order is always taken into account by a court in exercising its discretion as to the degree of punishment to be inflicted for a violation of its requirements.

A satisfactory answer to this position is, that the act in question in this case was not in any just sense an act even of municipal legislation. It is true that it took the form of a resolution, but in substance it was a grant upon condition; and even if immunity belongs to municipal legislation, it can not be that, by giving to an act not legislative the form of an ordinance or resolution, the jurisdiction of the courts can be defeated. Should it even be conceded that the resolution in question was partly legislative in its character, another part was most clearly a matter of agreement or grant. The latter it was within the jurisdiction of the court to prohibit; so far its prohibition would be operative. If the common council were still desirous of exercising their legislative functions upon the subject, it behooved them to see to it that they made a complete separation of the legislative part of the resolution from the residue. Making a grant is in its own nature not a legislative act. It is such an act as it has always been in the power of any court possessing equity jurisdiction to prohibit by injunction. A corporation, municipal or private, is capable of being sued. As a corporate body merely, it has no immunities which set it beyond the jurisdiction of the courts. It may be enjoined from making a grant, just as it may be ordered to make one. And as in the latter case it would be no answer to the court which ordered a grant to be made to say that to obey required legislative action, and that the order was therefore beyond its jurisdiction, so I apprehend that in the former case the answer, grounded on the same

position, is equally insufficient when addressed to a court which has forbidden a grant.

Again: whatever may be determined as to the proper character of this act, whether it is to be deemed legislative or not, when its character shall come directly in question, it is, I apprehend, plain that the question of its true legal character is judicial; one which must be disposed of by the adjudication of courts, and can be dealt with in no other way. The court, therefore, which is called upon to determine this question is called upon to perform a legitimate judicial function. It has authority to perform it, and is exercising jurisdiction when it makes its decision. It follows, that it has power to arrest the consummation of the act until it determines the question; and its order, though it may be erroneous, can not be regarded as void.

When an objection to the jurisdiction is pointed at the power of a particular tribunal to entertain and pass upon a question, it may be that its incidental or direct determination upon the question of its own power is always capable of being assailed collaterally. So far as this rule extends, it proceeds partly upon the ground that no other rule will suffice to restrain tribunals of limited jurisdiction within their proper bounds. But when the question relates not to the competency of the particular tribunal, but to the scope of judicial power, a different rule prevails. From necessity, the question must be determined judicially. No other power is competent to deal with it. No court is any more competent than any other court of general jurisdiction to pronounce upon it. No reason, therefore, exists why a determination of such a question by a tribunal having jurisdiction of the parties, and to whose jurisdiction over the subject-matter no special objection exists, grounded upon its limited character, should not be conclusive except in some direct proceeding to review the judgment. As the question must be determined by a judicial tribunal, and none is more competent to dispose of it than that to which it is presented, there seem to be many reasons why that tribunal before which it is first presented for decision should be regarded as able to decide authoritatively; and none why its decision should be subject to be re-examined collaterally. All the grounds upon which rests the general doctrine of the conclusiveness of judgments support the position: See *Nabob of the Carnatic v. The East India Company*, 1 Ves. jun. 388; S. C., 2 Id. 56; *Grignon v. Astor*, 2 How. 841; *Ex parte Watkins*, 3 Pet. 203. In truth,

such a question is not, in the sense of the law, a question of jurisdiction, but one of equity or right generally. In *Nabob of the Carnatic v. The East India Co.*, *supra*, Lord Thurlow said, to a plea that the matters of agreement in the bill related and grew out of matters of war and peace between sovereigns: "It is stated to be to the jurisdiction; but it differs from those pleas in all the particulars by which they are ever described; because it is truly observed that it is impossible to plead to the jurisdiction of any particular court without giving another remedy in some other court. This is so far from showing that, that it expressly says the plaintiff has no remedy in any municipal court whatsoever; therefore I take it this plea, if it means anything, is in fact a plea in bar. Suppose the contract was gratuitous; suppose it was honorary; suppose it was that species of contract upon which an action does not arise, and that it was necessary for the form of the plea to have brought into the view of the court that it was a demand of that description: the plea would have been a plea in bar of the action, and this is so if anything; and the whole argument tends to that end, namely, that considering the situation of the parties and the contracts as having a relation to that, such contracts do not give an action. That is a plea which goes in bar. A plea to the jurisdiction of all courts is absurd and repugnant in terms; for it is as much as to say that the nature of the subject is such as does not admit of an action. Suppose, for example, it was stated that all the matters upon which those in support of the plea rely comprehend that species of treaty which the law ought to pronounce impracticable for the cognizance of a court of municipal jurisdiction: it is only saying that an action does not lie." In my judgment, the consequence of a determination that we might in this case consider whether the superior court ought to have allowed this injunction, would be, that we should establish the rule that in all cases the question whether, upon the complaint, a right in the plaintiff was shown was open for consideration collaterally.

I do not, therefore, think it expedient further to consider this branch of the question, nor to consider what ought to have been the determination of the learned judge of the superior court on the application to grant the injunction. Having been granted in a case of which I conceive that court had jurisdiction, it must, for the purposes of this proceeding, be deemed at all events a valid exercise of power, and as such entitled to obedience.

The remaining questions in the case, relating to the proceedings upon the attachment, involve, to a considerable extent, matters resting in the discretion of the court below, and which, presenting no question of law, are not in any view of the case reviewable by us. Such are the differences in punishment inflicted upon the different persons proceeded against, depending upon the view of the court below as to the more or less aggravated character of the contempt of which they had respectively been found guilty.

The questions of law which it is necessary for us to consider I shall briefly advert to. The service of the summons and complaint, with the injunction upon the mayor of the city, was a sufficient service upon the defendants in the suit. In my opinion, the effect of an injunction or decree restraining any acts of a corporate body, and addressed in the ordinary way to it or its agents, etc., is, to bind not only the intangible artificial being, but also all the individuals who act for the corporation in the transaction of its business to whose knowledge the injunction or decree comes. Unless this be so, it would be necessary, in order effectually to bind a corporation by an injunction, to make every person a party to the suit who could by any possibility be its agent in doing the prohibited act. No such practice has ever prevailed.

On the contrary, I think the case of *Bank Commissioners v. City Bank of Buffalo*, 1 Barb. Ch. 636, before the chancellor, shows that the view above stated is in accordance with the rule of the former court of chancery. In that case the president of the bank, upon whom the injunction had been served, concealed the fact from the other officers of the bank, who ignorantly performed acts in violation of it. The chancellor held him guilty of contempt. This could only have been on the ground that the same acts would have been a contempt on the part of the other officers, if they had had notice of the injunction. Unless notice would have had this effect, the withholding information of the injunction from them by the president could not have been deemed a contempt, for the giving it, if it imposed no obligation, would have been an idle ceremony.

Whether a failure to serve a copy of the affidavit on which the injunction was granted will in any case render the injunction entirely inoperative, under section 220 of the code, which says, "A copy of the affidavit must be served with the injunction," but does not point out the consequences of not serving the copy, is not necessary to be determined in this case. Here there has

been a technical compliance, by making such service upon the mayor, with the summons and complaint by which the suit was commenced.

In administering the law in respect to the violation of injunctions, the court of chancery never lost sight of the principle that it was the disobedience to the order of the court which constituted the contempt, and therefore, although it required of the party availing himself of its order a substantial compliance with the rules of practice upon the subject, it would not usually allow the effect of its orders to be wholly lost, when the party sought to be bound by the order had actual knowledge or notice of its existence, although there might have occurred some slip in the formal method of bringing it home to him: *Hull v. Thomas*, 8 Edw. Ch. 236; *People v. Brower*, 4 Paige, 405; *McNeil v. Garrett*, 1 Cr. & Ph. 98.

In respect to the manner of proceeding against the defendants, I see no error on the part of the court below. Under the provisions of the revised statutes, pt. 3, c. 8, tit. 13, sec. 1, subd. 3, every court of record has power to punish, by fine and imprisonment, or either, any neglect or violation of duty, or any misconduct by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded, or prejudiced, in the following cases (among others): "3. Parties to suits, attorneys, counselors, solicitors, and all other persons, for the non-payment of any sum of money ordered by such court to be paid, in cases where by law execution can not be awarded for the collection of such sum; and for any other disobedience to any lawful order, decree, or process of such court." "8. All other cases where attachments and proceedings, as for contempts, have been usually adopted and practiced in courts of record to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party."

Under each of these provisions the case of the defendant may clearly be included. The court has determined, as matter of fact, that the defendant's conduct was calculated to and did actually defeat, impair, impede, or prejudice the rights or remedies of the relators; and there was certainly enough before them to make it entirely competent for them so to determine. From this determination, it resulted that they were bound to proceed to impose a fine, to imprison, or both, as the nature of the case might require: 2 R. S. 538, sec. 20. The punishment which has been imposed is within the legal limits to which the court

were authorized to extend it. The precise degree of punishment, within those limits, which the circumstances of the case called for rested, I think, entirely in the discretion of the court below, and their determination in respect to it does not present any question upon which we can be called upon to pass.

Having come to the conclusion that the determination below was correct, we do not think it necessary to express any opinion upon the preliminary question as to the right of appeal from the special to the general term.

The whole court concurred.

Judgment affirmed.

INJUNCTION, WHEN BECOMES BINDING: See *Farnsworth v. Fowler*, 55 Am. ec. 718, note 722, where this subject is discussed at some length. Where a defendant has actual notice of the injunction, he has no right to disobey or evade it, although there may have been some slip in the formal method of bringing it home to him: *Mayor etc. of N. Y. v. Conover*, 5 Abb. Pr. 251; *Forbes v. Logan*, 4 Bosw. 490; *People v. Kearney*, 21 How. Pr. 75; *Livingston v. Swift*, 23 Id. 3; *Hatch v. Chicago, R. I. & P. R. R. Co.*, 6 Blatchf. 115, all citing the principal case.

INJUNCTION OR ORDER OF COURT MUST BE OBEYED until vacated, although it may have been erroneously granted, in cases where the court has jurisdiction of the subject-matter: *Schell v. Erie R. R. Co.*, 51 Barb. 377; S. C., 35 How. Pr. 441; S. C., 4 Abb. Pr., N. S., 291; *People v. Albany & S. R. R. Co.*, 1 Lans. 343; S. C., 7 Abb. Pr., N. S., 304; S. C., 38 How. Pr. 266; *People v. Bergen*, 53 N. Y. 410; S. C., 15 Abb. Pr., N. S., 101; *Erie R'y Co. v. Ramsey*, 3 Lans. 180; *Pinckney v. Hagerman*, 4 Id. 376; *Clark v. Bininger*, 75 N. Y. 351; *State v. Harper's Ferry B. Co.*, 16 W. Va. 877, all citing the principal case. The order of a court having jurisdiction of the subject-matter is entitled to obedience, and disobedience of it is a contempt: *Erie R'y Co. v. Ramsey*, 45 N. Y. 644, citing the principal case. But where the court had no power to issue the injunction, it is utterly void, and the party enjoined can not be held liable for contempt in disobeying it: *Dawley v. Brown*, 43 How. Pr. 24, citing the principal case.

INJUNCTION MAY BE GRANTED TO RESTRAIN PUBLIC OR PRIVATE NUISANCE: See *White v. Flannigan*, 54 Am. Dec. 668, note 681; *People v. City of St. Louis*, 48 Id. 339, note 348, where other cases are collected.

JURISDICTION OF NEW YORK SUPERIOR COURT is as wide as the definition of an action under the code, and that is defined to be an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement of a right, the redress or prevention of a wrong: *Bennett v. Le Roy*, 5 Abb. Pr. 60; *International Bank v. Bradley*, 19 N. Y. 251. Its orders can not be attacked collaterally: *Kamp v. Kamp*, 46 How. Pr. 145. It has a general jurisdiction in equity cases: *Bowen v. Irish Presbyterian Congregation of the City of N. Y.*, 6 Bosw. 265, all citing the principal case.

THE PRINCIPAL CASE IS CITED in the cases given below, in support of the following propositions: Jurisdiction is the power to hear and determine the subject-matter in controversy between the parties: *D'Ivernois v. Leavitt*, 8 Abb. Pr. 63. Violators of an injunction may be punished for contempt:

Purchase v. New York Exchange Bank, 3 Robt. 168. The decision of a court of general jurisdiction, as to its jurisdiction, is conclusive until reversed: *Roderigas v. East River, S. I.*, 63 N. Y. 464. The decision of a court having jurisdiction of the subject-matter is binding as the judgment of a competent tribunal until it is reversed on review: *Wickelhausen v. Willett*, 10 Abb. Pr. 177; *Wood v. Mather*, 38 Barb. 481. The right to review an order of commitment for contempt exists where the alleged contempt consists in disobeying an injunction, and the court had no right to grant the injunction: *Mitchell's Case*, 12 Abb. Pr. 254. Jurisdiction does not relate to the rights of the parties as between themselves, but to the power of the court: *Fisher v. Hepburn*, 48 N. Y. 53; *Buffalo & S. L. R. R. Co. v. Supervisors of Erie Co.*, Id. 98. A party is guilty of contempt who permits work to be done under his eyes, and with his approval, after the doing of it has been enjoined: *Wheeler v. Gilecy*, 35 How. Pr. 148. To do a wholly ineffectual act, though forbidden by injunction, would hardly be deemed a violation of it; and therefore the act must be not only in defiance of the restraint, but must deprive the other party of some substantial right, or affect some substantial interest in order to make the party guilty of contempt: *Butler v. Niles*, 7 Robt. 339; S. C., 35 How. Pr. 332. The service of a copy of an order, a certified copy of the original being at the same time shown, is a sufficient service of the order to bring a party disobeying it into contempt: *Smith v. Smith*, 14 Abb. Pr. 132. A grant of a franchise to run a railway in the streets of a city is a contract: *Milhan v. Sharp*, 27 N. Y. 620. The court of common pleas of New York has jurisdiction of all actions against the city of New York: *New York & H. R. R. Co. v. Mayor etc. of N. Y.*, 1 Hilt. 584.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

MOORE v. THOMSON.

[BUTLER'S LAW, 221.]

PLEA IN ABATEMENT WILL BE ALLOWED upon suit brought before a justice where the payee of a bond indorsed thereon a payment for the purpose of bringing the amount within a justice's jurisdiction.

MAXIM APPLIED, NO ONE CAN MAKE ANOTHER HIS DEBTOR WITHOUT HIS CONSENT.

APPEAL from the superior court at Martin. Eli W. Moore & Co., plaintiffs; Nathan Thomson, defendant. *Assumpsit*. Plaintiffs sued defendant before a justice of the peace to recover one hundred dollars due on a note. They recovered judgment, and defendant appealed to the superior court. A plea of abatement was made, averring that the note was given to plaintiffs for the sum of one hundred and ten dollars and two cents; that plaintiffs brought suit in the county court; that there it was dismissed at plaintiffs' costs, and that plaintiffs' attorney, pending said suit, indorsed on the note a credit of ten dollars and two cents, and instituted this action before a justice of the peace; that the indorsement made by the attorney was made in order to change the jurisdiction from the higher court to the justice's court, and that thereby a fraud was committed upon the law as well as the legal rights of the defendant. Plaintiffs demurred, on the ground that the plea was argumentative. The plea was overruled, and a judgment entered for the plaintiffs. Defendant appealed.

Biggs, for the plaintiffs.

No counsel for the defendant.

By Court, PEARSON, J. The plea is not liable to the objection of being argumentative. It is prolix, and sets out irrelevant matter; but this is a mere form, and is not assigned as cause of demurrer.

The part of the plea which we suppose was intended to raise the objection that the names of the individuals who compose the firm of Moore & Co. are not set out in the warrant, being left blank, must be treated as surplusage, for the whole is thus in effect blank, and the rule, *Utile per inutile*, etc., applies. So the only question is in reference to the fraud upon the jurisdiction.

The creditor without the knowledge or consent of the debtor enters a credit on the note for the purpose of giving jurisdiction; the debtor has never assented to or ratified this credit, but has always objected to it. This does not amount to a payment, and the magistrate had consequently no jurisdiction. It is a familiar maxim of law, "No one can make another his debtor without his consent." The converse is equally true. No one can give another a specific article or a sum of money unless he chooses to accept it; and although in this latter case the acceptance is usually presumed (as it is supposed to be for his benefit), yet there may be reasons why he may not choose to accept (as in our case), and then the presumption is rebutted. Suppose a creditor, whose debt is about being barred by the statute of limitations or the presumption of payment, enters a credit; no effect whatever is given to it unless the debtor assents to it. It is said this is like the case of a plaintiff who remits a part of his damages to prevent a variance. There is no analogy; for then the court allows the *remittitur* as an amendment of the record: *State v. Mangum*, 6 Ired. L. 369; *Fortescue v. Spencer*, 2 Id. 63; both assume that the case now under consideration would be a fraud upon the jurisdiction.

Judgment reversed, and judgment that the writ be abated.

THE PRINCIPAL CASE WAS APPROVED in *Ramsour v. Barrett*, 5 Jones L. 419. This case resembles the principal case, but differs from it in the respect that the credit indorsed on the note was an actual one, but the credit, instead of being indorsed October 5, 1857, was indorsed so as to date it back a year, thus reducing the note in order to bring it within the jurisdiction of the justice of the peace. The court, in the decision rendered, said: "We can not distinguish this case in principle from that of *Moore v. Thomson*. So the plaintiff will not be allowed to give a real credit a fictitious date, so as to thereby reduce the debt against the will of the debtor. The false date to the credit is just as much an attempt to evade the law as was the false credit itself in *Moore v. Thomson*, and neither can receive the sanction of this court."

BOND v. HILTON

[BURNER'S LAW, 308.]

TENANTS IN COMMON AND PARTNERS MAY CONTRACT WITH ONE OF THEIR NUMBER concerning the use of the property so held; and its violation gives a good cause of action at law to those injured.

WHERE OBLIGATION TO DO PARTICULAR ACT EXISTS, and there is a breach of that obligation and a consequent damage, an action on the case will lie.

CASE founded on tort. Appeal from the superior court of Washington county. Thomas Bond and E. H. Willis, plaintiffs; James B. Hilton, defendant. The parties to this action owned a vessel, the plaintiffs owning three fourths and the defendant one fourth. The action arose on the following state of facts: In December, 1850, the vessel lay at Plymouth with a cargo on board, and the defendant contracted with the plaintiffs that he would, as master of the vessel, with proper diligence, conduct her to the West India islands, sell the cargo, and on his return account with the plaintiffs. Defendant assumed charge of the vessel and conducted her to Newbern, North Carolina, where after some delay he abandoned her. The court intimated that the facts proved were not sufficient to sustain the action, and plaintiffs submitted to a nonsuit. A rule *nisi* was obtained, rule discharged, and the plaintiffs appealed.

Rodman and Moore, for the plaintiffs.

Heath and Hines, for the defendant.

By Court, NASH, C. J. On the part of the defendant it is contended that he, the defendant, and the plaintiffs were tenants in common of the vessel, and therefore this action can not be maintained for any misuse of it; and secondly, if any can be brought, it must be on the contract, and not in tort. That an action can be sustained by one tenant in common against another for a misuser of the property is proved by many cases. In *Cubitt v. Porter*, 8 Barn. & Cress. 257, Littledale, J., says, if two persons are tenants in common of a tract of land on which there is a brick wall, and one refuses to repair, and the other pulls it down and sells the materials and builds a better wall, it may be said there is total destruction of the old wall, and an action of trespass will lie. But if he sold the old materials for the purpose of building a new one, an action of trespass will not lie. "Such an act is more properly the subject-matter of an action on the case, because it is in the nature of a partial injury, and not of a total destruction of the subject-matter of

the tenancy in common." And Baily, J., in the same case, says, when there has not been a total destruction of the subject-matter of the tenancy in common, "but only a partial injury to it, an action on the case will lie by one tenant against the other." See also *Anders v. Meredith*, 4 Dev. & B. L. 199. It may then be safely laid down as a principle governing actions between tenants in common, that when there is a total destruction of the article held in common, an action of trover or trespass may be sustained; but where there has been simply an abuse of it whereby its value is impaired, an action on the case may be brought. As to the second point contended for by the defendant, we think it untenable. The plaintiffs have not declared on the contract, but in tort, making the neglect of duty on the part of the defendant the *gravamen* of their claim. Two questions are presented to us: the first, Can tenants in common contract with each other concerning the subject-matter of the tenancy? and if so, can they desert the contract and declare in tort? The case of *Owston v. Ogle*, 13 East, 538, is a direct authority upon the first branch of the inquiry. There the plaintiff declared upon a special agreement in writing, made between himself and the defendant and several others by name, part owners of a ship, whereby they and each and every of them agreed to and with the others and each and every of the others, among other things, that the ship should proceed on a voyage to the West Indies, and should be under the sole management and control of the defendant as husband thereof, etc. To this declaration the defendant demurred and filed special causes: the first was that the plaintiff and defendant were, with certain other persons, part owners and partners in the ship, and that the action was brought on a partnership account; the fourth was that by reason of any duty relating to a partnership in the ship, independent of the agreement, the defendant is not liable to an action at law. The court would not suffer Abbott, who appeared for the plaintiff, to make any argument; the demurrer was overruled, and judgment given for the plaintiff. That case very clearly recognizes the principle that tenants in common and partners may make a contract with one of their number concerning the use of the property so held, and its violation gives a good cause of action at law to those injured. Upon the second branch of the inquiry we are of opinion the action is properly brought in tort; where the law, from a given statement of facts, raises an obligation to do a particular act, and there is a breach of that obligation and a consequent damage, an action on the case,

founded on the tort, in the proper action. In *Govett v. Radnidge*, 3 Id. 70, Lord Ellenborough observes there is no inconvenience in suffering a plaintiff to allege his *gravamen* as consisting in a breach of duty arising out of an employment for him, and bringing the action for that breach rather than upon a breach of promise. So Baily, J., in *Burnett v. Lynch*, 5 Barn. & Cress. 609, says although there be a special contract a party is not bound to resort to it, but he may declare on the tort, and say that the defendant has neglected to perform his duty. See Saunders on Pl. & Ev. 338. This doctrine is recognized in this state in the cases of *Williamson v. Dickens*, 5 Ired. L. 259; *Ledbetter v. Torney*, 11 Id. 294; *Robinson v. Threadgill*, 13 Id. 39. The plaintiff was entitled to sue in tort, and if the evidence showed that there had been a breach of duty on the part of the defendant in performing his contract, the plaintiff would have been entitled to a verdict. This was a matter of inquiry for the jury under the proper instructions of the court. But his honor did not submit the question to the jury, but nonsuited the plaintiffs. In this there was error.

Judgment reversed, and *venire de novo* awarded.

REMEDY AGAINST CO-TENANT FOR NEGLIGENCE.—When a mill owned in common was burned through the negligence of one of the tenants in common, it was held that one of his co-tenants might maintain a joint action on the case against him therefor: *Chesley v. Thompson*, 14 Am. Dec. 324. An action on the case has long been recognized as an available remedy for many of the wrongs suffered by one co-tenant from the hands of another: See Freeman on Cotenancy and Partition, sec. 297, and the cases there cited.

SATTERTHWAITE v. DOUGHTY.

[BUBBEN'S LAW, 814.]

CONTRACT VOID IN PLACE WHERE MADE BECAUSE ON UNSTAMPED PAPER is void everywhere.

APPEAL from Beaufort superior court. F. B. Satterthwaite, plaintiff; John J. Doughty, defendant. The plaintiff declared as assignee of two bonds made in Baltimore, by the defendant, who resided in North Carolina. The bonds were delivered to the payees, who resided in Baltimore, and by them indorsed to the citizens of the same place, who in turn assigned them, without consideration, to the plaintiff for collection. On the trial in the lower court, defendant contended that one of the bonds was invalid because it lacked the stamp required by the law of

Maryland. The court intimated that such was his opinion, and the plaintiff submitted to a nonsuit and appealed.

Rodman, for the plaintiff.

Donnell, for the defendant.

By Court, *BATTLE*, J. The first objection urged by the defendant against the plaintiff's right to recover is, that by the laws of the state of Maryland, where the bond was executed, it was void because not written upon stamped paper. If upon consideration this objection be found to be valid, it will dispose of the case, and make it unnecessary to consider any other question discussed by the counsel.

The act of Maryland, upon which the defendant relies, is entitled "An act imposing duties on promissory notes, bills of exchange, specialties, and other instruments of writing, to aid in paying the debts of the state." It was passed in the year 1844, and in the first section imposes certain duties upon every sheet or piece of paper, etc., upon which shall be written or printed any bond, obligation, single bill, or promissory note, etc. In the eighth section it is declared "that no instrument of writing whatsoever, charged by this act with the payment of a duty as aforesaid, shall be pleaded or given in evidence in any court of this state, or admitted in such court to be available for any purpose whatsoever, unless the same shall be stamped or marked as aforesaid," etc. The question is, whether, as the bond was executed in the state of Maryland upon unstamped paper, and could not therefore be made available for any purpose in the courts of that state, it can be enforced in the courts of this state by the obligee or his assignee. In the English cases upon this subject there seems to have been a direct conflict of opinion among judges of great eminence. In *Alves v. Hodgson*, 7 T. R. 241, Lord Kenyon held that the plaintiff could not recover upon a written contract made in Jamaica, which by the laws of that island was void for want of a stamp. Lord Ellenborough ruled the same way in *Clegg v. Levy*, 3 Camp. N. P. 166, with regard to an agreement not valid for the same cause by the laws of Surinam. In *Wynne v. Jackson*, 2 Russ. 351; S. C., 3 Eng. Cond. Ch. 144, the vice-chancellor held the contrary upon certain bills drawn in such form in France that no recovery could be had upon them in the courts of that country. Lord Chief Justice Abbott held the same in the case of *James v. Cathwood*, 3 Dow. & Ry. 190; S. C., 16 Eng. Com. L. 165. The English elementary writers attempt to reconcile these apparently

conflicting decisions by making this distinction: if the bill, note, or agreement be drawn or made in a foreign independent state, it may be enforced in England, though requiring a stamp in the country where drawn or made, but not if drawn or made in any part of the British empire: Ch. Bills, 57; Byles on Bills, 302; 61 Law Lib. 295.

On the other hand, Judge Story, both in his commentaries on promissory notes, section 158, and on the conflict of laws, section 260, contends with much force of reasoning that "if by the laws of a foreign country a contract is void unless it is written on stamped paper, it ought to be void everywhere; for unless it be good there, it can have no obligation in any other country. It might be different if the contract had been made payable in another country, or if the objection were not to the validity of the contract, but merely to the admissibility of other proof of the contract in a foreign court." In section 261 of his work on the conflict of laws, a book universally recognized as one of the highest authority, he states the grounds of his opinion as follows: "The ground of this doctrine as commonly stated is, that every person contracting in a place is understood to submit himself to the law of the place, and silently to assent to its action on the contract. It would be more correct to say that the law of the place of the contract acts upon it independently of any volition of the parties, in virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its own territory. And in admitting the law of a foreign country to govern in regard to contracts made there, every nation merely recognizes from a principle of comity the same right to exist in other nations which it demands and exercises for itself." This course of reasoning commends itself strongly to our judgments, and we think that it is especially applicable to the several states of our confederacy, which, though foreign to each other in some respects, are united for all great national purposes under one government, and ought therefore, whenever they can, to aid rather than hinder each other in carrying out each its own peculiar policy; and to do this in nothing more than in regard to its revenue laws. In doing this we shall be supported by the authority of the course pursued by the English courts towards those provinces of the British empire which are governed by their own domestic laws: Byles on Bill, *ubi supra*.

We have not been referred to, nor have we been able to find, any case decided in our own state directly upon this point.

But our courts have several times recognized the doctrine that "the law of the country where a contract is made is the rule by which its validity, its meaning, and its consequences are to be determined:" *Watson v. Orr*, 3 Dev. L. 161. This doctrine was applied in *Anderson v. Doak*, 10 Ired. L. 295, to the support of a bill of sale for slaves without a subscribing witness, executed in Virginia, where no such formality is required. And in *Drewry v. Phillips*, Busb. L. 81, decided at the last term, it was admitted by counsel that a bill of sale for slaves, executed in Virginia, where all the parties resided, was good though not attested, nor proved and registered as required by the laws of North Carolina, because by the laws of Virginia no such attestation, proof, and registration were necessary. We can see no reason for a distinction between a formality made requisite to the validity of a contract by the law of a state in aid of its revenue and a formality required for any other cause. In every such case, the *lex loci contractus* ought to determine the rights of the parties everywhere. We therefore think that his honor committed no error in holding that the present action could not be sustained, and the judgment of nonsuit must be affirmed.

Judgment affirmed.

VALIDITY OF CONTRACTS.—Judge Story, in his admirable work entitled "The Conflict of Laws," lays down as one of the rules illustrative of the validity of contracts, "that all the formalities, proofs, or authentications of them which are required by the *lex loci* are indispensable to their validity everywhere else;" and in support of this rule, he cites a number of foreign authors on the same subject, in addition to the cases cited by the court in the principal case: Story's Conf. L., sec. 260. It will thus be seen that the cases which have been determined have been limited in number. The cases which have arisen in this country, and which, with the exception of the principal case, have presented the question of the validity of contracts on unstamped paper, have been those which arose after the passage of the United States internal revenue law by congress during the civil war. These cases present two classes: 1. Cases which held that contracts were void, unless the paper was duly stamped according to the provisions of the act referred to; 2. Those cases which held that the absence of stamps did not tend to invalidate the contract, unless there was an intention to evade the provisions of the act; and it might be added here, that the act passed by the legislature of Maryland, to which the principal case refers, provided that "where the formality of stamping had been neglected, it should be lawful for the person or persons holding such instrument to make oath that at the time of making or receiving such instrument or writing the said holder or holders thereof did not know of the requisitions of this act; or, that if he or she did know of such requisitions, that the said instrument was made or received through inadvertence or forgetfulness thereof, and with no intention to evade the provisions of this act," etc.

The case of *Davy v. Morgan*, 56 Barb. 218, was one in which an appeal was

taken from the lower court in refusing to permit an agreement, upon which the action was founded, to be read in evidence, by reason of it not having an internal revenue stamp affixed to it. The court, in passing upon the question, said that "the power of raising revenue by means of stamp-duties has been exercised by congress from time to time since 1797, and it has passed many acts in relation thereto, to only two or three of which it is necessary to refer. In 1797 an act was passed to lay duties on stamped vellum, parchment, and paper, by which it laid a stamp-duty on a large class of instruments; and the fourth section of the act imposed a penalty for not stamping such instruments, and declared them void. The thirteenth section also required another large class of instruments to be stamped, and for the intentional omission to do so imposed a penalty, and declared that no such instrument should be pleaded or given in evidence in any court, or be admitted in any court to be available in law or equity until it should be stamped as aforesaid. This act continued in force about five years.

In 1813 congress passed a similar act to continue during the war with Great Britain, and for one year thereafter, embracing a large class of contracts. It imposed pecuniary penalties for violation of its requirements. It also declared, section 7, "that no instrument or writing whatsoever, charged by this act with the payment of a duty as aforesaid, shall be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity, unless the same shall be stamped or marked as aforesaid."

The language of the act of congress, as amended March 3, 1865, and under which the agreement in question was made, is, "that any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, etc., without the same being duly stamped, or having thereon an adhesive stamp for denoting the duty chargeable thereon, with intent to evade the provisions of this act, shall for every such offense forfeit the sum of fifty dollars, and such instrument or paper, etc., shall be deemed invalid and of no effect." The contract, therefore, was properly rejected. In two other cases it was held that the "contract was invalid, whether there was or was not an intent to defraud the government:" *Hugus v. Strickler*, 19 Iowa, 413; *Myers v. Smith*,⁴⁸ Barb. 614; and was not admissible in evidence without a stamp: *Plessinger v. Depuy*, 25 Ind. 419; *Beebe v. Hutton*, 47 Barb. 187; *Cole v. Bell*, 48 Id. 194; *Myers v. Smith*, Id. 614; *Hoppock v. Stone*, 49 Id. 524; *Howe v. Carpenter*, 53 Id. 282; *Hugus v. Strickler*, 19 Iowa, 413; *Garland v. Lane*, 46 N. H. 245; but if the stamp was affixed after the commencement of the action, and prior to offering the document in evidence, *contra*: *Day v. Baker*, 36 Mo. 125; *Beebe v. Hutton*, *supra*.

In the second class of cases it has been uniformly held that, in order to defeat a recovery on an unstamped note, or a note insufficiently stamped, it must appear, not only that the note is unstamped or insufficiently stamped, but that the stamp has been fraudulently omitted, and that there has been an unmistakable intention to evade the law. See the following cases: *Vaughan v. O'Brien*, 57 Barb. 491; *Vorebeck v. Roe*, 50 Id. 302; *Schermerhorn v. Burgess*, 55 Id. 422; *N. H. & N. Co. v. Quintard*, 6 Abb. Pr., N. S., 128; S. C., 37 How. 29; *Baker v. Baker*, 6 Lans. 509; *Trull v. Moulton*, 12 Allen, 398; *Desmond v. Norris*, 10 Id. 250; *Carpenter v. Snelling*, 97 Mass. 452; *Hallock v. Jaudin*, 34 Cal. 167; *Duffy v. Hobson*, 40 Id. 240; *Thomasson v. Wood*, 42 Id. 416; *Hitchcock v. Sawyer*, 39 Vt. 412; *People v. Gates*, 43 N. Y. 40. And in many of the states at least it was held, with respect to the late stamp-act, that "congress has no constitutional authority to legislate concerning

rules of evidence administered in the state courts, nor to affix conditions or limitations upon which these rules are to be applied and enforced:" *Duffy v. Hobson*, 40 Cal. 243; *Carpenter v. Snelling*, 10 Gray, 457. In a Wisconsin case it was held that the provision of the act which required stamps to be affixed to "writs or other original process, by which any suit is commenced in a court of record," was unconstitutional and void; such writs or other process being essential means by which the state governments exercise their functions, and as such exempt from taxation: *Jones v. Keep*, 19 Wis. 369; *People v. Weston*, 28 Cal. 639; *Baird v. Pridmore*, 29 How. 253; *Fifield v. Close*, 15 Mich. 505; *Warren v. Paul*, 22 Ind. 276; *Brayton v. County of Delaware*, 16 Iowa, 44.

In the case of *People v. Frank*, 28 Cal. 509, the defendant was indicted for forgery. His counsel contended that the indictment was not good, inasmuch as the forged note was unstamped, and for that reason the note could not be enforced. Sanderson, J., who delivered the opinion, held that the note was admissible in evidence against the defendant, and that the offense was complete whether the instrument was stamped or not.

DOE EX DEM. COBB v. HINES.

[BURNER'S LAW, 343.]

DEED UNTECHNICAL, UNGRAMMATICAL, AND TOTALLY AT VARIANCE with all the recognized rules of orthography may be valid if there be sufficient words to declare clearly and legally the party's meaning.

TO CREATE COVENANT TO STAND SEISED, no particular form of expression is necessary, and the words "I also place, etc., J. M. H. agent of the hereafter-named property, to be to use and benefit of my daughter C.," are sufficient, and the statute will pass the legal title from the grantor.

APPEAL from Wayne superior court. Doe *ex dem.* Enoch Cobb, plaintiff; James M. Hines, defendant. Action of ejectment, brought by the lessor of the plaintiff. The lessor of the plaintiff, upon the intermarriage of the defendant with his daughter Cartha, executed a deed, the material parts of which were as follows: "Know all men by these presents, that I, Enoch Cobb, for the inconsideration of the good-will, favor, and affection that I bear to Rewards my son and law James M. Hines, I give to the said James M. Hines the following negroes, etc. In witness whereof I hereunto set my hand and seal this twenty-third of February, 1839. (Signed) E. Cobb. [Seal.] I also place and set over and appoint James M. Hines agent of the hereafter-named property, to be to use and benefit of my daughter Cartha, and the lawful heirs of her body, to them and their successors, to wit, Patsy, Winny, Ellick, little Kedar, Abram, and Smithea, and the following tracts of land [describing them]. In witness whereof, I hereunto set my hand and seal this twenty-third day of February, 1839. (Signed) E.

Cobb. [Seal.]” The lessor of the plaintiff demanded possession of the land, and the defendant refused to surrender. Upon the trial, the court rendered a judgment *pro forma* for the plaintiff, and the defendant appealed.

J. H. Bryan and Wright, for the plaintiff.

Moore, for the defendant.

By Court, BATTLE, J. The deed under which the defendant claims, and by virtue of which he seeks to defeat the recovery of the plaintiff's lessor, is, as must be admitted, very informal. It is untechnical, ungrammatical, and totally at variance with all the recognized rules of orthography, and yet it may be valid, if “there be sufficient words to declare clearly and legally the party's meaning:” 2 Bla. Com. 298. It is our duty now to inquire whether the words contained in this deed be sufficient to enable us to pronounce what is the party's meaning. It may facilitate our inquiries to recur to fundamental principles, and ascertain what rules have been established by the sages of the law for the construction of deeds. The three following, given by Blackstone in his Commentaries, 2 Id. 379, and supported by many authorities, both before and since his day, will be sufficient for our purpose. These rules are:

1. “That the construction be favorable and as near the minds and apparent intents of the parties as the rules of law will admit. For the maxims of the law are, that *verba intentioni debent inservire*, and *benigne interpretamur chartes propter simplicitatem laicorum*. And therefore the construction must also be reasonable and agreeable to the common understanding.”

2. “That *quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est*; but that where the intention is clear, too minute a stress be not laid on the strict and precise signification of words; *nam qui hæret in litera, hæret in cortice*. And another maxim of law is, that *mala grammatica non vitiat chartam*; neither false English nor bad Latin will destroy a deed.”

3. “That the construction be upon the entire deed, and not merely upon disjointed parts of it. *Nam ex antecedentibus et consequentibus fit optima interpretatio*. And therefore, that every part of it be, if possible, made to take effect, and no word but what may operate in some shape or other. *Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*.” See *Smith v. Packhurst*, 3 Atk. 135; 1 Preston's Shep. Touch. 87; *Den d. Bronson v. Paynter*, 4 Dev. & B. L. 393; *Armfield v. Walker*, 5 Ired. L. 580; *Den d. Davenport v. Wynne*, 6

Id. 129; *Kea v. Robeson*, 5 Ired. Eq. 373; *Den d. Brooks v. Ratcliff*, 11 Ired. L. 321.

Now, if we apply these rules and the principles plainly deducible from them to the deed under consideration, we think that the intention of the parties may easily be ascertained from the words which they have employed. In the first part of the instrument the donor gives, in language which admits of no doubt, certain slaves to his son-in-law, declaring that he so gives them because of the good-will, favor, and affection which he bears towards him. He then proceeds: "I also place and set over and appoint James M. Hines [the defendant, his son-in-law] agent of the hereafter-named property, to be to the use and benefit of my daughter Cartha, and the lawful heirs of her body, to them and their successors, to wit," etc., naming certain slaves, and the tract of land now in dispute. The defendant's counsel contends that these words contain, in substance and effect, a covenant by the plaintiff's lessor to stand seised to the use of his son-in-law, or of his daughter, the defendant's wife; that the consideration is either expressed in the deed, by means of the reference to that recited in the first part, or that it is implied from the relationship of the parties apparent in the deed; that the relationship, whether of consanguinity to the daughter or affinity to the son-in-law, is a good consideration, sufficient to raise a use, and that therefore the deed is effectual to transfer the land either to the daughter or son-in-law; and in either case the plaintiff's lessor can not recover. For these positions the counsel cites the following among other authorities: *Bac. Abr.*, tit. Covenants, A; *Platt on Covenants*, 3 (3 Law Lib.); *Bedell's Case*, 7 Co. 40; 2 *Sanders on Uses and Trusts*, 81; *Milbourne v. Simpson*, 2 Wils. 22; 2 *Preston's Shep. Touch.* 512 (31 Law Lib.) The counsel for the plaintiff's lessor, on the other hand, contends that the words relied upon by the defendant are unmeaning, that no covenant is expressed, and that none can be implied, because it would be repugnant to the idea of an agency in the son-in-law that no sufficient consideration appears to raise a use either to the daughter or son-in-law, and that the instrument is therefore void and of no effect; and he cites, in support of his argument, *Co. Lit.* 49 a, and *Den d. Springs v. Hanks*, 5 Ired. L. 30.

We think that it is clear that the plaintiff's lessor intended to give to his daughter and the heirs or her body, or to his son-in-law for the use of his daughter and the heirs of her body, the land and slaves mentioned in the second part of the instrument in

question. This appears plainly from the fact that, having given certain slaves to his son-in-law in the first part of the deed, he commenced the second part with saying, "I also place, etc., James M. Hines agent of the hereafter-named property, to be to use and benefit of my daughter Cartha," etc. What could he mean, if he did not intend his daughter to have the use of the property which he proceeds to enumerate? The authorities cited clearly show that no particular words or form of expression are necessary to create a covenant. They show that the relationship of the parties appearing on the face of the deed is sufficient to manifest the consideration and raise a use; and that relationship by affinity to a son-in-law is a good consideration; why, then, can not the deed operate according to the intention of the covenantor? The parties to the deed are certain, the property intended to be conveyed is certain; and yet we are told that because the son-in-law is appointed agent instead of trustee for the daughter, or because he stands between the father and his daughter, the property can not go to her use. To this objection we give an answer in the grave and emphatic language of Lord Chief Justice Willes, in the case of *Smith v. Packhurst*, 3 Atk. 136: "Another maxim is, that such a construction should be made of the words of a deed as is most agreeable to the intention of the grantor; the words are not the principal thing in a deed, but the intent and design of the grantor; we have no power in deed to alter the words, or to insert words which are not in the deed, but we may and ought to construe the words in a manner the most agreeable to the meaning of the grantor, and may reject any words that are merely insensible. These maxims, my lords, are founded upon the greatest authority—Coke, Plowden, and Lord Chief Justice Hale; and the law commends the *astutia*, the cunning of judges in construing words in such a manner as shall best answer the intent; the art of construing words in such a manner as shall destroy the intent may show the ingenuity of, but is very ill becoming, a judge."

An instance of this *astutia* is given by Blackstone, 2 Com. 298, when he says that by the grant of a remainder, a reversion may well pass, and *e converso*. In the deed before us the intent of the father to give property to the use of his daughter is plain, and that intent may be effectuated by construing the word "agent" to mean "trustee," and it may be so construed without doing much violence to its proper meaning; for a trustee is in some sort an agent to manage property for the benefit of another.

We think that we can do this, and that we ought to do it, and thus escape the condemnation pronounced upon judges who exercise their ingenuity in construing words so as to destroy instead of to give effect to the intention of parties as manifested in their deeds. Whether the operation of the deed was to vest the legal estate in the defendant in trust for his wife and her heirs, or whether she took the legal estate so as to give him a life estate as tenant by the curtesy, the lessor of the plaintiff can not recover. The judgment in favor of the lessor must therefore be set aside, and judgment of nonsuit be entered according to the case agreed.

Judgment accordingly.

GRAMMATICAL SENSE OF WORDS NEED NOT BE ADHERED TO in construing a deed where the contrary intent is apparent from the whole instrument: *Jackson v. Topping*, 19 Am. Dec. 515.

COVENANT TO STAND SEISED, WRITING GOOD AS, WHEN: See *Bell v. Scammon*, 41 Am. Dec. 706, and cases cited in the note thereto.

THE PRINCIPAL CASE WAS APPROVED on the first point in *Barnes v. Haybarger*, 8 Jones L. 76, and *Royster v. Royster*, Phill. L. 226; and also approved on the second point in *Register v. Rowell*, 3 Jones L. 312.

DOE EX DEM. GLENN v. PETERS.

[BUBBEE'S LAW, 457.]

TERM FOR YEARS IN LAND, being a chattel, is liable to levy and sale by a constable under a justice's execution.

TERM FOR YEARS WAS LIABLE AT COMMON LAW TO BE LEVIED ON AND SOLD under a *fieri facias* as a chattel.

APPEAL from the county court at Rowan. Doe *ex dem.* Uriah Glenn, plaintiff; John Peters, defendant. The following are the facts: Both parties claimed title under one Williams, who held a leasehold interest for ten years to the premises in dispute. The lessor of the plaintiff claimed title by virtue of a justice's judgment and a constable's levy, which were returned to the county court, where the judgment of the justice was affirmed, and an order of sale issued to the sheriff. At the sheriff's sale the lessor of the plaintiff became the purchaser, and received a deed from the sheriff. The defendant claimed under a justice's judgment, a constable's levy, and sale prior in point of time to the sale to the lessor of the plaintiff; but these proceedings were not returned to the court. The only point to be determined was whether a constable can sell a leasehold in-

terest in land (*e. g.*, lease for ten years) without an order of the court. The court held that he could, and so instructed the jury. A verdict was rendered for the defendant, and plaintiff appealed.

Boyden, for the plaintiff.

Craige, for the defendant.

By Court, PEARSON, J. A term for years is a chattel real, constitutes a part of the personal estate, passes by succession to the executor or administrator, and is assets for the payment of debts. Termors are not considered the owners of the soil, or entitle to the privileges or distinction of freeholders, but have merely the right to occupy and take the profits. A term for years does not come within the operation of the English statute of enrollment, or of our statute concerning registration: *Doe d. Wall v. Hinson*, 1 Ired. L. 276; *Burnett v. Thompson*, 13 Id. 379.

A term for years was liable at common law to be levied on and sold under a *fiery facias* as a chattel: Bingham on Judgments, 3 Law Lib. 46; *Taylor v. Cole*, 3 T. R. 292.

So the only question is, Has the common law been changed? and is there any statute requiring terms for years to be returned to court and the sale to be made by the sheriffs under a *venditioni exponas*, as in the case of land? The only statute relied on is statute of 1777, making lands and tenements liable for the payment of debts, under a *fiery facias*.

We can see no principle of construction by which a statute, the professed object of which is to subject a new species of property to sale under execution, can incidentally be made to have the effect of elevating a chattel into land so as to make it necessary to sell the former with all the solemnity required in regard to the latter. The statute contains no intimation of an intention to make this change. It is true that a term for years is an estate in land, and it is capable of supporting a vested remainder; but still it is a chattel, liable to be sold under the common-law *fiery facias*, and treated in every respect as a part of the personal estate.

It was said in the argument that much injustice might sometimes be done if a long and valuable lease for years could be sold by a constable with as little ceremony as a cow or horse. The suggestion addressed to the law-makers would have much force in it, and, as is said in *Burnett v. Thompson*, *supra*, in reference to registration, it may be well in this way to call the

attention of the legislature to the subject. But we are confined to the question of construction, and have nothing to do with the matter of expediency.

There is no difference between a term of ten years and a term of one year, except that the statute of frauds requires the former to be in writing; consequently a construction of the act of 1777 which would require long terms to be sold as land would also require short terms to be sold in the same way; and it would frequently happen that the lease would expire before there could be a levy returned to court, notice to the defendant, *renditioni exponas*, forty days' advertisement, sale by the high sheriff, sheriff's deed, a writ of possession after an action of ejectment. The mode of selling land, therefore, is wholly inapplicable to many leases. As no distinction can be made, the construction contended for is inadmissible.

This is the first time that the question of selling leases has been presented. It is to be accounted for, no doubt, by the fact that the system of leasing has not been generally adopted in this state. The few leases that have been made have been generally for one, two, or three years, at rack-rent, that is, a rent equal to the annual value of the land; and as the purchaser, as assignee, is bound for the rent and performance of covenants, it has seldom been thought worth while to offer them for sale under execution.

Long leases at a nominal rent, when a fine or price is paid at their creation, with the privilege of removal, are almost unknown.

This state of things furnishes a strong argument against the construction of the act of 1777 contended for, because it shows that the subject has not heretofore been deemed of any great importance; and there was no sufficient reason or mischief to call for a change of the common law by which leases were to be elevated and put on a footing with freehold estates. Consequently they have been permitted to continue to occupy the place of chattels, and to be transferred and applied to the payment of debts like any other part of the personal estate.

The matter of construction is put beyond all question by the fact that terms for years are excluded from the operation of the word "land" used in two other important statutes. We have seen that terms for years need not be registered. The act of 1715, R. S., c. 37, provides that "no conveyance or bill of sale for land shall be good, etc., unless proven and registered within two years after the date of the deed."

The statute of 32 Hen. VIII. permits lands and tenements to be devised. It has never been suggested that terms for years came within the operation of this statute; on the contrary, they have been permitted to pass, as at common law, to the executor, and by his assent, after the payment of debts, to pass to the legatee like other personal estate.

Judgment affirmed.

TERM FOR YEARS MAY BE SOLD UNDER JUSTICE'S EXECUTION: *Barr v. Doe*, 38 Am. Dec. 146. Leasehold estates were, like movables, subject to seizure and sale at common law: *Coombs v. Jordan*, 22 Id. 236.

STATE v. MCINTIRE.

[1 JONES' LAW, 1.]

JUDGMENT IS ANNULED BY APPEAL TO SUPREME COURT.

PARDON IS VITIATED BY SUPPRESSION of the fact that the judgment was appealed from, it appearing from the charter of pardon that the executive regarded the judgment as subsisting; especially where the appeal was taken for delay and the punishment was discretionary.

IGNORANCE OF LAW IS NO EXCUSE.

EVERY INTENDMENT IS MADE AGAINST PARTY GUILTY OF SUPPRESSION of a fact.

HAS GOVERNOR POWER TO PARDON PORTION OF SUPPOSED PUNISHMENT WHEN IT IS DISCRETIONARY, before it is fixed by judgment? *quære*.

MISINFORMATION OF GOVERNOR APPEARING UPON FACE OF PARDON INVALIDATES IT; consequently, where the pardon shows that the governor supposed the defendant had been fined as well as imprisoned, and pardons the prisoner from imprisonment on condition that he pay the fine and costs, but the prisoner had not been fined but imprisoned only, the pardon is void.

PARDON DOES NOT TAKE EFFECT IF UPON CONDITION PRECEDENT IMPOSSIBLE TO BE PERFORMED.

JAMES and David McIntire were indicted for assault and battery, tried, convicted, and sentenced to imprisonment, but not fined. They appealed, and pending the appeal a pardon was granted by the governor. The material portion of the pardon is stated in the opinion. On the case being sent back to the superior court, the attorney general prayed judgment against the defendants and moved they be fined. The court was of opinion he had no power to impose a fine, and discharged the defendant upon the payment of cost. The attorney general appealed.

M. W. Ransom, attorney general, for the state.

Person, contra.

By Court, PEARSON, J. His honor was of opinion that by reason of the pardon he had no power to impose a fine. We do not concur, and are of opinion that the pardon was inoperative. His honor should have proceeded to judgment, and had power to imprison as well as fine, one or both at his discretion, the pardon to the contrary notwithstanding.

The pardon recites the conviction and sentence of imprisonment, and then proceeds to "pardon the offense of which they stand convicted, remitting so much of said judgment as extends to imprisonment, upon the express condition that they shall first pay the fines and costs incident to said judgment," etc.

This is not a pardon of the offense, but of a portion of the punishment imposed by the judgment, for the general words first used are qualified, and the intention is declared to be only to remit the imprisonment on condition that the fine and costs are paid.

"The king pardoneth a felony whereof A. stands attainted, and in truth he is not attainted; this is *expressio falsi*, and maketh the pardon void:" 3 Co. Inst. 238.

"If a man be attainted of felony by judgment, and afterwards the king pardoneth generally the felony, it is naught worth, and the reason thereof is not because by the attainder the felony is extinct, but because the king is not truly informed (as he ought to be) of the true state of the case; for peradventure, if he had been informed of the truth and of all the proceedings, he would not have pardoned:" *Cases of Pardons*, 6 Co. 13 a.

"It seems to be laid down as a general rule in many books, that whenever it may be reasonably intended that the king, when he granted a pardon, was not fully apprised both of the heinousness of the crime, and also how far the party stands convicted thereof upon record, the pardon is void, as being gained by imposition upon the king. And this is very agreeable to the reason of the law, which seems to have intrusted the king with this high prerogative upon a special confidence that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wit of man can not possibly make so perfect as to suit every particular case:" 2 Hawk. P. C., c. 37, sec. 8.

"It is a general rule that whenever it may reasonably be presumed the king is deceived, the pardon is void; therefore, any suppression of truth, or suggestion of falsehood, in a charter

of pardon will vitiate the whole, for the king was misinformed:" 4 Bla. Com. 398.

We think it may reasonably be intended that the governor was not fully informed of the proceedings in the case of these defendants. We can look only at the record, of which a copy of the pardon is a part, and can take notice of nothing *aliunde*.

There are three grounds, either of which is sufficient to vitiate the pardon: 1. The judgment is referred to in the pardon as subsisting, whereas, in fact, it was annulled by an appeal to the supreme court; and if that court should decide there was error, and direct a *venire de novo*, the conviction also would be annulled, and the defendants stand as if there had been no trial. If it should decide there was no error, the judge presiding at the next term of the superior court would proceed to give judgment, and impose fines or imprisonment, or both, in his discretion. This would be a new judgment, and have no connection with the judgment that had been annulled by the appeal. This is settled: *State v. Manuel*, 4 Dev. & B. L. 38. Indeed, the statute upon this subject sets forth the law as plainly as words can express it: "In criminal cases the decisions of the supreme court shall be certified to the superior court from which the case was transmitted to the supreme court, which said superior court shall proceed to judgment and sentence, agreeably to the decision of the supreme court and the laws of the state:" R. S., c. 33, sec. 6. As the governor, at the time he executed the charter of pardon, acted upon the supposition that there was a judgment, it may reasonably be presumed that he was led into error by the suppression of the fact that the defendants had appealed.

If it be said that the defendants were ignorant of the effect of the appeal, the reply is, No man shall be heard to say that he is ignorant of the law. This is settled. Courts are compelled to act upon this rule, as well in criminal as in civil matters. It lies at the foundation of the administration of justice. There is no telling to what extent, if admissible, the plea of ignorance would be carried, or the degree of embarrassment that would be introduced into every trial by conflicting evidence upon the question of ignorance: *State v. Boyett*, 10 Ired. L. 336; *Hart v. Roper*, 6 Ired. Eq. 349.

If it be suggested that the fact of the appeal was immaterial, so far as the action of the governor was concerned, and would not have influenced him in the premises, the reply is, without undertaking to say how far it would have had an influence on

him, it is sufficient to say it was well calculated to influence him to some extent. Every intendment is made against a party who is guilty of a suppression of a fact.

Had the governor been put in possession of the fact that there was an appeal, and consequently that there was no judgment, it is a reasonable presumption that he would either have taken the responsibility of granting an absolute pardon of the offense, as he had a clear right to do, either before or after judgment, or that he would have deferred his action until the supreme court disposed of the question, and he should be certified of the sentence that the judge presiding at the next term of the superior court had felt it to be his duty to pronounce. This latter course would have recommended itself by the consideration that if the supreme court directed a *venire de novo* the defendant might be acquitted, or if there was an error, the judge who imposed the sentence might not imprison the defendants, and so the pardon would be unnecessary; or at all events, if the second judge should also think it to be his duty, under all the circumstances, to imprison the defendants, he would have the benefit of that additional fact in aid of the exercise of his own discretion.

And it is an unreasonable presumption that he would, instead of pursuing one of the two courses above indicated, have attempted to do a thing *in futuro* by a present act, and to remit at that time, by his charter of pardon, a part of a judgment which was not then *in esse*, which might never have an existence, and the existence of which would depend upon certain contingent events which he had no right to anticipate.

The governor may pardon an offense after it is committed, but it does not follow that he has power to do so before it is committed: other considerations are then involved; *e. g.*, it would be in effect a license to commit crime. So the governor may pardon a portion of the punishment after it is fixed by judgment, upon the ground that he has power to pardon the whole—the greater includes the less; but it does not follow that he has power to pardon a portion of the supposed punishment, when it is discretionary, before it is fixed by judgment, for other considerations are then involved; *e. g.*, it would interfere with the due administration of the law, and be in effect a rod held over the judge, by giving him to know what the governor thought his judgment ought to be, or “a solicitation to deal favorably by the defendants;” this the queen of England can not rightfully do, and yet she may rightfully pardon the offense entirely, and

the charter of pardon is a bar to all further proceedings. The pardoning power conferred by our constitution is derived from the laws of England.

We are not at liberty to decide at this time whether the governor has such a power, because it has not been exercised or claimed in this case. It is sufficient for our purpose to say that the power is questionable, and if so, fairness required that the fact of there being no judgment should have been disclosed when the pardon was applied for; and it is the extreme of unfairness to obtain a pardon upon the supposition that there is a judgment, and make use of it afterwards, when the judgment is about to be rendered. If it had no other effect, it was calculated to influence the discretion of the judge, or to embarrass him, by letting him know what the governor thought of the matter. In the language of my Lord Coke, "peradventure, if he had been informed of the truth and of all the proceedings, he would not have pardoned."

2. As appears by the transcript sent to this court, the appeal was taken for the mere purpose of delay, no bill of exceptions being sent, and there being no motion in arrest. If this fact had been made known to the governor, it was well calculated to influence the exercise of his discretion. The appeal was in fact taken merely to get time to apply for the pardon. This was a perversion of the right of appeal to a purpose entirely different from that for which it was conferred, and it can not be supposed that the governor would give countenance to an attempt to obtain an object by indirection. The inference is, that he believed the defendants were in jail, and the intent of the pardon was to remit the residue of the imprisonment. The pardon sets out that the judgment was subsisting; it follows that the governor was not apprised of the appeal, and of course he did not know it was taken for delay.

If it be said the defendants wished to avoid the disgrace of going to jail, and as the law had provided no mode by which they could be allowed time to apply for the pardon, they were compelled to adopt the contrivance of taking an appeal, as a *dernier ressort*, and are therefore excusable, the law permits the presiding judge to postpone the time for carrying the sentence into execution, in order to give time to apply for a pardon, whenever, in his opinion, there are circumstances favorable to the defendants: 4 Bla. Com. 392.

But, it is suggested, this provision is of no avail in cases like the present, where the punishment is left to the discretion of the

judge; for if he thinks there are favorable circumstances, he will himself take them into consideration, and impose a punishment so mild as to make a pardon unnecessary. This is true; but the fact that the law has made no provision for allowing time to apply for a pardon in such cases, together with the consideration that they do not fall within the principle stated by Hawkins, in the passage cited above, as being the basis of the pardoning power, and the seeming inconsistency of allowing a discretion confided to the presiding judge, who hears the whole case upon sworn testimony, to be reviewed by the discretion of the governor, who acts upon *ex parte* statement, tends to show that it was contemplated that the power would be exercised sparingly, and only in extreme cases; for instance, if new matter should occur after the judgment.

We do not mean to be understood as intimating an opinion that the executive has not a general power to pardon; but when he is called upon to abate, not the rigor of a punishment fixed by law upon general rules, but the rigor of a high judicial officer, on the ground that he has not sufficiently tempered his discretion with mercy, it is of the utmost importance that all of the facts should be fully disclosed.

8. The pardon was "on condition that the defendants should first pay the fines and all costs incident to said judgment;" it is apparent that the governor was under the belief that a fine had been imposed upon each of the defendants. By accepting the pardon with this condition on its face, they are fixed with notice that the governor was misinformed, and could not in fairness avail themselves of an error into which he had fallen. In reference to this there is another view. Here was a condition precedent, which it was impossible for the defendants to perform, because there was no fine to be paid; and it is common learning, that in such cases the deed never takes effect, and is void. "If the condition precedent be impossible, no estate or interest shall grow thereupon:" Co. Lit., b. 3, c. 5, sec. 334.

The governor, as appears upon the face of the pardon, supposed the defendants had each been fined as well as imprisoned and intended to remit the imprisonment, provided they in the first place paid the fines; and yet such use has been made of the pardon as to enable them to escape both fine and imprisonment. Every one will say this is not right; and the fact that the law declares a pardon obtained under such circumstances to be void is one among the many instances showing the truth of the maxim, "The common law is the perfection of reason."

This opinion will be certified, to the end that the superior court may proceed to judgment and sentence agreeably to this opinion and the laws of the state.

IGNORANCE OF LAW AS EXCUSE: See *State v. Paup*, 56 Am. Dec. 303; *Hart v. Roper*, 51 Id. 425.

EFFECT OF APPEAL ON PROCEEDINGS IN LOWER COURT: See *Helm v. Boone*, 22 Am. Dec. 75; *Tyler v. Morris*, 34 Id. 395; *Pinckney v. Henegan*, 49 Id. 592. The principal case was quoted approvingly in *State v. Alexander*, 76 N. C. 233.

DEFINITION OF PARDON.—Abbott defines pardon as the “governmental forgiveness of an offense; authorized remission of a punishment of crime; the executive act by which a convict may be released from penalties.” Abbott’s Law Dict., tit. Pardon. Bouvier adopts the definition given by Marshall, C. J., in *United States v. Wilson*, 7 Pet. 160, viz., that it is “an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.” Bouv. Law Dict., rev. and enlarged ed., tit. Pardon. Wharton says: “Pardon, in its technical legal sense, is a declaration on record by the sovereign that a particular individual is to be relieved from the legal consequences of a particular crime.” 1 Whart. Crim. L., 7th ed., sec. 591 a. This definition is probably the most accurate and comprehensive, and best expresses the legal signification of the word. Bishop’s definition of it as a “remission of guilt” is undoubtedly true, but is defective, in that it is rather a definition of the effect of a pardon than of a pardon itself.

IN WHOM PARDONING POWER VESTED, AND POLICY OF POWER.—In England, the pardoning power is vested in the crown, by whom it has been exercised from time immemorial: *United States v. Wilson*, 7 Pet. 160. “The power of pardoning offenses is inseparably incident to the crown; and this high prerogative the king is intrusted with upon a special confidence that he will spare those only whose case, could it be foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man can not possibly make so perfect as to suit every case.” Bac. Abr., tit. Pardon, A. “With us, the constitutions of the United States and of the several states provide for pardons; or should there be a state or two in which this is not so, the defect is supplied by legislation. By the constitution of the United States, the president is vested with the ‘power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.’ In most of the states the power is reposed in the governor, who is to exercise it with the advice of his council or other officers designated for the purpose, or alone, as the provision may be.” 1 Bish. Crim. L., sec. 899. The pardoning power, whether exercised under the federal or state constitutions, is the same in nature and effect as that exercised by the representatives of the English crown in this country in colonial times: *People v. Bowen*, 43 Cal. 439; S. C., 13 Am. Rep. 148. The language of the constitution of the United States must be construed by the exercise of that power in England prior to the revolution: *Ex parte Wells*, 18 How. 307; *United States v. Wilson*, 7 Pet. 160; Pomeroy’s Const. L., sec. 685. In *State v. Nichols*, 26 Ark. 74; S. C., 7 Am. Rep. 600, it was held that the pardoning power was not naturally or necessarily an executive function, and where the constitution was silent, vested no more in one branch of the government than in the other.

Although some writers oppose the pardoning power, it has received the almost unanimous support of the ablest jurists and students of government. Blackstone speaks of it as the "most amiable prerogative of the crown;" 4 Bla. Com. 396; and Montesquieu regards it as "the most glorious attribute of sovereignty:" Montesquieu's Spirit of Laws, 89. And Hamilton said: "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without any easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance:" Federalist, No. 74. And Story says: "A power to pardon seems indeed indispensable under the most correct administration of the law by human tribunals; since otherwise men would sometimes fall a prey to the vindictiveness of accusers, the inaccuracy of testimony, and the fallibility of jurors:" Story's Const., sec. 1494.

WHAT OFFENSES MAY BE PARDONED; HEREIN OF REMISSIONS OF FINES AND PENALTIES.—Lord Coke defined a pardon to be "a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty." Professor Pomeroy, in commenting on this definition, says: "The general language above quoted must be taken with the following limitations, which, indeed, Lord Coke expressly makes. The right, title, debt, or duty which the king may forgive must be one due or owing to the state, and not one owing to a private person. Also, the offense must have been committed, and the liability to penalty must therefore have accrued. A permission given to a person or class of persons to commit offenses, with a pardon remitting the penal consequences thereof, would be absolutely void. The prerogative to issue such promissory pardons was once claimed by the crown; but the claim has long been abandoned. It would amount to a power of dispensing with the compulsive effect of statutes, or the law generally, which the English people have resisted with success:" Pomeroy's Const. L., sec. 682; and see also 2 Gabbett's Crim. L., 583. The king can not discharge a recognizance taken for the security of the peace, but after forfeiture he may: *Shipley v. Craister*, 2 Vent. 131. And a recognizance conditioned for the appearance of a defendant charged with a criminal offense may be remitted by the governor after forfeiture, and a judgment upon it, for the use of the county: *Commonwealth v. Denniston*, 9 Watts, 142. The offense of contempt is pardonable: *Ex parte Hickey*, 4 Smed. & M. 751; *State v. Sauvinet*, 24 La. Ann. 119; S. C., 13 Am. Rep. 115; *In re Muller*, 7 Blatchf. 23. And where a fine is imposed by the court as a punishment for a contempt, the case is none the less within the pardoning power of the president because the amount of the fine is directed by the court in the order imposing the fine, to be paid to the plaintiff in a suit in which an injunction was issued, a violation of which constituted the contempt, towards the reimbursement of his expenses in the attachment proceedings in respect of such contempt: *In re Muller*, *supra*. Transient nuisances are pardonable, but those which are continuing are not: *Thomas v. Sorrell*, Vaugh. 333. Generally a governor may remit fines: *Commonwealth v. Shisler*, 2 Phila. 256; *Baldwin v. Scoggin*, 15 Ark. 427; although the fine, when collected, is to be paid into the county treasury for

the use of the common schools: *Baldwin v. Scoggin*, *supra*. And the power of the president has always been construed to extend to the remission of fines, penalties, and forfeitures accruing to the United States, for offenses against the United States: *Pollok v. Laura*, 12 Rep. N. S., 452; *Osborn v. United States*, 91 U. S. 478. And a governor may remit a portion of a fine: *State v. Twitty*, 4 Hawks, 193. But the executive can not, by means of the pardoning power, interfere with vested rights. The fines, penalties, and forfeitures which the executive may remit are such only as are payable to the state: *Shoop v. Commonwealth*, 3 Pa. St. 126; *State v. Bailey*, 1 Bail. 378. Fees due officers of the court are vested rights, and are not discharged when the defendant receives an unconditional pardon: *State v. Mooney*, 74 N. C. 98; S. C., 21 Am. Rep. 487. And after a final decree of condemnation unappealed from in a cause of seizure by a collector for a breach of the revenue laws, the secretary of the treasury has no authority to remit the collector's share of the forfeiture, as it is a vested right: *The Hollen*, 1 Mason, 431; and see *United States v. Lancaster*, 4 Wash. 64. And the executive can not remit the interest or share of an informer: *Grosset v. Ogilvie*, 5 Bro. P. C. 527; *State v. Williams*, 1 Nott & M. 26; *Rowe v. State*, 2 Bay, 565; *The Laura*, 19 Blatchf. 562; *United States v. Harris*, 1 Abb. 110. But in *United States v. Thomasson*, 4 Biss. 336, it was held that a pardon by the president, remitting the whole penalty for a violation of the revenue laws, remitted the moiety adjudged the informer, as well as the portion coming to the United States. The governor can not remit that portion of a fine in a criminal or civil case belonging to the attorney for the commonwealth by law: *Commonwealth v. Morgan*, 14 B. Mon. 314; *Frazier v. Commonwealth*, 12 Id. 369; *Commonwealth v. Spraggins*, 18 Id. 512. But formerly in that state it was held that a statute allowing the commonwealth's attorney twenty-five per cent of the amount collected on prosecuting any one to conviction for gaming did not affect the right of the governor to remit all of the penalty: *Roult v. Feemster*, 7 J. J. Marsh. 131. And the right of an attorney accrues upon the rendition of the judgment, and not before; and the governor has a constitutional power to remit forfeiture before the judgment: *Commonwealth v. Spraggins*, 18 B. Mon. 512; *Commonwealth v. Morgan*, 14 Id. 314. And where the statute provides that if a forger shall be convicted and fined one half of the penalty shall go to the person whose name is forged, the legislature has power to release the penalty: *Rankin v. Beaird*, Breese, 123. See, further, *post*, head "Restoration of Property Forfeited and of Fines."

AT WHAT TIME PARDON MAY BE GRANTED.—If the language of a constitution does not prohibit the governor from granting a pardon before conviction, he may pardon as well before as after conviction: *State v. Woolery*, 29 Mo. 300; *Dominick v. Bowdoin*, 44 Ga. 357; *Commonwealth v. Bush*, 2 Duv. 264; but by the old constitution of Illinois a governor could not pardon before conviction: *Ex parte Birch*, 3 Gilm. 134, 145; nor can he by the constitution of 1870, art. 5, sec. 13. And in North Carolina the constitution allows pardons only after trial and conviction: *State v. Alexander*, 76 N. C. 231; S. C., 22 Am. Rep. 675, and conviction as there used denotes a verdict of guilty rendered by a jury; and therefore when the defendant after verdict and judgment in the court below appealed to the governor, and pending such appeal was pardoned by the governor, the pardon is authorized by the constitution and is valid: *Id.* And in Massachusetts, whose constitution provides that no pardon granted before conviction shall avail the party pleading the same, it was held that a pardon granted after a verdict of guilty and before sentence, and while the exceptions allowed were pending in this court for argu-

ment, was valid: *Commonwealth v. Lockwood*, 109 Mass. 323; S. C., 12 Am. Rep. 699. Gray, J., said: "The ordinary legal meaning of 'conviction,' when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury, which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the fact thus ascertained." And in Virginia, where the constitution restricts the power of the governor to pardoning after conviction, a similar construction was adopted, and a pardon after a verdict of guilty and before sentence passed was held valid: *Blair v. Commonwealth*, 25 Gratt. 850. A prisoner may be pardoned even after his term of imprisonment has expired: *State v. Foley*, 15 Nev. 64; S. C., 37 Am. Rep. 458; 2 Crim. Law Mag. 127, 837; *State v. Baptiste*, 26 La. Ann. 134; *People v. Bowen*, 43 Cal. 439; S. C., 13 Am. Rep. 148. "Imprisonment and hard labor are not the only punishments which the law inflicts upon those who violate its commands. Besides these, are disabilities which are the consequences of conviction and which remain after incarceration had ceased. A pardon is supposed to be granted to one who has been improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effects would be only a half-way relief:" *Per Morgan, J.*, in *State v. Baptiste*, *supra*.

VALIDITY OF PARDONS.—1. *Delivery and Acceptance of*.—A pardon must be regarded as a deed, to the validity of which delivery is essential: *In re De Puy*, 3 Ben. 307; *Ex parte Hunt*, 10 Ark. 284; and delivery to the person suing for it is effectual: *Ex parte Reno*, 66 Mo. 266; S. C., 27 Am. Rep. 337; and it must be accepted by the accused: *Grubb v. Bullock*, 44 Ga. 379. "A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance:" *Per Marshall, C. J.*, in *United States v. Wilson*, 7 Pet. 160; consequently a person who was under indictment at the time when the governor published his proclamation of amnesty and pardon, and who failed to signify his acceptance of the proffered pardon before the repeal of the law under the authority of which the proclamation was published, can not thereafter claim the benefit of it: *Michael v. State*, 40 Ala. 361.

2. *Fraud or Mistake, Effect of*.—Pardons obtained by fraud are void: *Dominick v. Bowdoin*, 44 Ga. 357; *Commonwealth v. Kelly*, 9 Phila. 586; *State v. Leak*, 5 Ind. 359. Thus where it may reasonably be inferred from the language of a pardon or remission, considered in connection with the record of the cause in which it was granted, that the executive was deceived or imposed upon by those procuring it, by false statements or omissions to state relevant facts, the pardon or remission is void: *State v. Leak*, *supra*. But a court can not go behind a pardon on *habeas corpus* to inquire into the regularity of the proceedings; nor can the question be raised whether the pardon was obtained by false and fraudulent pretenses; and where it appears on *habeas corpus* that the pardon is fair on its face and unconditional, that puts an end to any inquiry into the manner of obtaining it: *Re Edymoin*, 8 How. Pr. 478; and in *Knapp v. Thomas*, 11 Am. Law Rec. 666; S. C., 29 Alb. L. J. 83, it was held that an unconditional pardon accepted by the prisoner could not be treated as a nullity in a proceeding on *habeas corpus*, prosecuted by such prisoner against one who rearrested him on the ground that the pardon was obtained by fraud; but in *Dominick v. Bowdoin*, 44 Ga. 357, it was held that the court upon the suggestion of fraud in the trial of a *habeas corpus* should hear the evidence and pass upon the merits as to the facts in

the particular case, and that it was error in the court to hold that the question could only be inquired of by a jury.

3. *Miscellaneous Questions Affecting Validity of Pardon.*—A variance in the name of the prisoner from "Edymoin" to "Edymoire" is immaterial, and does not vitiate a pardon: *Re Edymoin*, 8 How. Pr. 478; nor does the misstatement of the date of the conviction, if it is possible to show that it was intended to cover and does cover the offense of which the record shows the witness to be guilty: *Commonwealth v. Ohio & Pa. R. R.*, 1 Grant Cas. 329; nor failure to give notice of the application for a pardon: *State v. Foley*, 15 Nev. 64; S. C., 37 Am. Rep. 458; 2 Crim. Law Mag. 127, 837; *Re Edymoin*, 8 How. Pr. 478; and it is not void although not registered in the office of the secretary of state, where all the official acts of the governor are required by law to be registered: *Ex parte Reno*, 66 Mo. 266; S. C., 27 Am. Rep. 337; and although the reasons for it are not expressed, and the indictment and attainder only are recited therein: *Rex v. Parsons*, Show. 283. And the pardon of a prisoner convicted of larceny is not vitiated by the omission of the direction for the restoration of the property stolen or the payment of its value: *Hester v. Commonwealth*, 85 Pa. St. 139.

CONDITIONAL PARDONS.—It is well settled that the executive may attach conditions to a pardon: *United States v. Wilson*, 7 Pet. 161; *Ex parte Wells*, 18 How. 307; *United States v. Six Lots of Ground*, 1 Wood, 234; *Ex parte Hunt*, 10 Ark. 284; *Arthur v. Craig*, 48 Iowa, 264; S. C., 30 Am. Rep. 395; *People v. Potter*, Edm. Sel. Cas. 235; S. C., 1 Park. Cr. 47; *Flavell's Case*, 8 Watts & S. 197; *Commonwealth v. Haggerty*, 4 Brews. 326; *State v. Smith*, 1 Bail. 283; S. C., 19 Am. Dec. 679; *Lee v. Murphy*, 22 Gratt. 789; S. C., 12 Am. Rep. 563; although the contrary rule formerly prevailed in Virginia: *Commonwealth v. Fowler*, 4 Call, 35; and when accepted by the convict, it is a contract between him and the state: *People v. Potter*, *supra*; and if accepted by the prisoner, he has no right to contend that the pardon is absolute and the condition void on the ground of duress: *Ex parte Wells*, *supra*; the condition may be precedent or subsequent: *Commonwealth v. Haggerty*, *supra*; *Flavell's Case*, *supra*; *Arthur v. Craig*, 48 Iowa, 264; but it must be reasonable and compatible with the genius of our laws: *Commonwealth v. Haggerty*, *supra*; and it must not be illegal, immoral, or impossible to be performed: *Arthur v. Craig*, *supra*; *People v. Potter*, *supra*; *Lee v. Murphy*, *supra*; *United States v. Six Lots of Ground*, *supra*; it may, with the consent of the prisoner, be any punishment recognized by statute; *Lee v. Murphy*, *supra*; a condition that the prisoner leave the state is valid: *People v. Potter*, *supra*; *State v. Smith*, *supra*; *Ex parte Lockhart*, 1 Disney, 105; *Commonwealth v. Haggerty*, *supra*; as is a condition that the offender submit to a specific punishment and then leave the state: *State v. Addington*, 2 Bail. 516; also the conditions: 1. That the prisoner refrain from the use of intoxicating liquors; 2. That he shall, during that time, use all proper exertions for the support of his mother and sister; 3. That he shall not be convicted of any offense against the criminal laws of the state: *Arthur v. Craig*, 48 Iowa, 264; but a condition in the pardon that it was not to relieve A. from the legal disabilities arising from his conviction and sentence, but only from imprisonment, is incongruous and repugnant, and ought to be rejected: *People v. Pease*, 3 Johns. Cas. 333. In *Commonwealth v. Haggerty*, 4 Brews. 326, it was held that a void condition nullified the pardon; but in *People v. Pease*, 3 Johns. Cas. 333, a void condition was rejected and the pardon was allowed to stand. A prisoner who accepts a conditional pardon, and seeks to avail himself of its benefits, must show a strict compliance with its terms:

Scott v. United States, 8 Ct. of Cl. 457; *Haym v. United States*, 7 Id. 443. The burden of proof is on him to show compliance with the condition: *Waring v. United States*, Id. 501. Thus where one sentenced to six months imprisonment and to pay a fine and costs was pardoned on condition that he pay the fine and costs, he is not entitled to his discharge as a poor convict under section 1042 of the revised statutes, providing for release of poor convicts sentenced to pay fine and costs: *In re Ruhl*, 5 Saw. 186. So also where the condition was that the prisoner submit to a specific punishment and then leave the state, the infliction of the punishment will not dispense with the performance of the other part of the condition: *State v. Addington*, 2 Bail. 516; S. C., 23 Am. Dec. 150. If the prisoner fails to perform the condition, the original sentence remains in full force, and may be carried into execution: *Flavell's Case*, 8 Watts & S. 197; *Commonwealth v. Haggerty*, 4 Brews. 326; *State v. Addington*, *supra*; *People v. Potter*, Edm. Sel. Cas. 235; S. C., 1 Park. Cr. 47; *Arthur v. Craig*, 48 Iowa, 264; S. C., 30 Am. Rep. 395. Thus if the condition is that the prisoner leave the state, and he fails to do so, he may be remanded to his original sentence: *Ex parte Lockhart*, 1 Disney, 105; *State v. Smith*, 1 Bail. 283; S. C., 19 Am. Dec. 679; *State v. Fuller*, 1 McCord, 178; *Rex v. Arckles*, 1 Leach, 4th ed., 390; *Rex v. Madan*, Id. 223; *Ex parte Marks*, 11 Pac. C. L. J. 610; 4 Crim. Law Mag. 965, 997; 12 Am. Law Rec. 252 (cited in 47 Am. Dec. 560). On being brought before the court to have the sentence reiterated and another day passed for its infliction, he may show cause why it should not be passed, but is not entitled to a trial by indictment or on a written rule to show cause: *State v. Chancellor*, 1 Strobb. 347; S. C., 47 Am. Dec. 557; sickness and poverty are sufficient excuses for not leaving the country: *Rex v. Thorpe*, 1 Leach, 4th ed., 396, note; and so is mental derangement: *People v. James*, 2 Cai. 57. In *Ex parte Hunt*, 10 Ark. 284, it was held that if the pardon contained a condition to "depart without delay" from the state, and that the prisoner did depart but returned afterwards, there was a sufficient compliance with the condition, and the prisoner could not be remanded. This decision is opposed to the general rule, and sacrifices reason, justice, and the public welfare to technical refinement. Its rule would as well work injustice to prisoners as it would cause conditions to be drawn with unnecessary strictness, as a consequence not allowing room for even a reasonably liberal construction to be adopted in their favor. In *Commonwealth v. Haggerty*, 4 Brews. 326, it was held that a condition that the prisoner leave the state meant a departure and a permanent absence from the country during at least the term of the sentence. Where a prisoner is pardoned on the condition that if again sentenced he is to serve the remainder of his first sentence, he can not under the Massachusetts statutes be imprisoned under the first sentence after the date when it would have expired had he not been pardoned, although his second sentence is before that date: *West's Case*, 111 Mass. 443. A condition in a pardon that the person to whom it is granted shall not claim any of his property or the proceeds thereof that had been sold by order of a judgment or decree of a court under the confiscation laws of the United States is a bar to his claim: *United States v. Six Lots of Ground*, 1 Wood, 234; but such a condition is only intended to protect purchasers at judicial sales, decreed under the confiscation laws, from any claim of the original owner for the property sold or the purchase money paid; consequently such a condition does not preclude him from applying to the court for the proceeds of a confiscation money bond secured by a mortgage, which was collected by the officers of the court, in part by the voluntary payment

by the obligors, and in part by the sale of the lands mortgaged: *Osborn v. United States*, 91 U. S. 474.

EFFECT OF PARDON.—1. *Construction of.*—Acts of pardon and amnesty are to be liberally construed: *State v. Blalock*, Phill. 242; and they are to be taken most beneficially for the subject and most strongly against the grantor: *Wyrrat's Case*, 5 Co. 496; *Ex parte Hunt*, 10 Ark. 284; but a pardon which is confined to one offense can not be extended to another: *Regina v. Harrod*, 2 Car. & Kir. 294; *Rex v. Maddocks*, 1 Sid. 430; *Ex parte Weimer*, 8 Biss. 321; *Hawkins v. State*, 1 Port. 475; *State v. Foley*, 15 Nev. 64; S. C., 37 Am. Rep. 458; 2 Crim. Law Mag. 127, 837; *State v. McCarty*, 1 Bay, 334; *Mount v. Commonwealth*, 2 Duv. 95. Formerly, in England, a general pardon did not pardon simony: *Phillips' Case*, 1 Sid. 170; and a pardon excepting murder does not except a *felo de se*: *Tombes v. Ethrington*, 1 Lev. 120.

2. *Restoration of Property Forfeited and of Fines.*—A pardon does not restore goods forfeited and vested in the crown or commonwealth, without words of restitution: *Tombes v. Ethrington*, 1 Lev. 120; S. C., 1 Saund. 361; *Rex v. Saloway*, 3 Mod. 100; *Aldrich v. Jessup*, 3 Grant Cas. 158. A pardon does not annul past transactions so far as to invalidate a previous judicial confiscation and sale of a claimant's property: *United States v. Six Lots of Ground*, 1 Wood, 234. In *Knote v. United States*, 10 Ct. of Cl. 397, the court held that the president could not restore forfeited property, although he could pardon the offense which caused the forfeiture; and that congress had the power to dispose of the property and that, therefore, property confiscated to the United States was beyond the reach of executive clemency, and was absolutely national property. But this is opposed to the general rule: See head "Remissions of Fines and Penalties," *supra*. Interests of third persons which have accrued are not divested by a pardon: *United States v. Lancaster*, 4 Wash. 64; *Kirk v. Lewis*, 9 Fed. Rep. 645; *Brown v. United States*, McCahon, 229, and cases cited *ante*, head "Remissions of Fines and Penalties;" but in proceeding for confiscated property until the order of distribution is made of the proceeds of the property sold, or until the money is actually paid into the hands of the party entitled to receive it as informer, or into the treasury of the United States, no vested right to it has accrued so as to prevent the pardon restoring it to the petitioner: *Brown v. United States*, *supra*. And a full pardon, granted and accepted prior to the seizure of property or the institution of any proceedings to condemn it, is a bar to a judgment of condemnation under the confiscation acts: *United States v. Athens Armory*, 35 Ga. 344; S. C., 2 Abb. 129.

So far as the public is interested in a fine imposed, the executive remission has the effect to restore it to the individual fined, although it had been paid over to the county treasury: *Matter of Flournoy*, 1 Ga. 606; and a similar principle was held in *Cope v. Commonwealth*, 28 Pa. St. 297; see also *Commonwealth v. Shialer*, 2 Phila. 258; and a pardon remits penalties accruing to the crown: *Rex v. Greenvelt*, 12 Mod. 119; S. C., *sub nom. Greenvelt's Case*, 1 Ld. Raym. 213, 214; and a pardon remitting a fine discharges the prisoner from a note given for the fine, although it had been sued on and judgment had been obtained upon it before the fine was remitted: *Parrott v. Wilson*, 51 Ga. 255; but after a fine has been paid over to an informer, his right is indefeasible, and a subsequent pardon by the governor gives the prisoner no right of action to recover it back from the informer: *Rucker v. Bosworth*, 7 J. J. Marsh. 645. In New Jersey, the pardoning power does not extend to the remission of a fine paid: *Cook v. Middlesex*, 3 Dutch. 637; S. C., 2 Id. 326.

3. *Effect on Liability for Costs.*—It may be laid down as a general rule

that a pardon does not discharge liability for costs: *Holliday v. People*, 5 Gilm. 214; *State v. Farley*, 8 Blackf. 229; *Estep v. Lacy*, 35 Iowa, 419; S. C., 14 Am. Rep. 498; *State v. McO'Blenis*, 21 Mo. 272; *Libby v. Nicola*, 21 Ohio St. 414; *Ex parte McDonald*, 2 Whart. 440; *Smith v. State*, 6 Lea, 637; *Angha v. Commonwealth*, 10 Gratt. 696; *Edwards v. State*, 12 Ark. 122. Under the old English law a pardon before sentence discharged costs: *Hall's Case*, 5 Co. 51; *Watts' Case*, Cro. Jac. 335; but if subsequently granted, it did not discharge the costs: *Hall's Case*, *supra*. In Mississippi a somewhat similar rule prevails. There a pardon before conviction is a bar to a judgment against the accused for the costs and witness-fees: *White v. State*, 42 Miss. 635; but if granted after conviction and judgment for costs, it does not extinguish the civil liability for the costs, although the prisoner can not be held in confinement to compel the payment of costs: *Ex parte Gregory*, 56 Miss. 164; and where the appellant in a criminal case, who has given a bond to supersede the judgment fixing his punishment and taxing him with the costs, is pardoned, he is not relieved from his civil liability on the bond: *Phillips v. State*, 58 Miss. 578; S. C., 3 Crim. Law Mag. 444. In Ohio, an execution for a fine and costs, issued after a pardon, is void: *Blanchard v. State*, Wright, 377; and in North Carolina, a defendant, upon producing an unconditional pardon, has a right to be discharged without paying costs, where he had taken an appeal and the case was affirmed, and the transcript returned, and on the solicitor's moving for judgment he produced the pardon: *State v. Underwood*, 64 N. C. 599. In Pennsylvania, a rule similar to the old English rule prevails, and there, if the pardon comes before judgment, the costs are remitted: *Duncan v. Commonwealth*, 4 Serg. & R. 449; *Playford v. Commonwealth*, 4 Pa. St. 144 (this case was misunderstood by the reporter); *Commonwealth v. Hitchman*, 46 Id. 357; but if judgment fixes his liability for the costs of the prosecution he is not discharged therefrom by a subsequent pardon: *Schuylkill Co. v. Reifsnyder*, 46 Id. 446.

4. *Effect on Disabilities Arising from Crime.*—A pardon not only relieves a person from imprisonment, but also removes all the disabilities resulting from the criminal act: *Perte v. Cambridge*, 3 Lev. 332; *Wood v. Fitzgerald*, 3 Or. 568; *People v. Bowen*, 43 Cal. 439; S. C., 13 Am. Rep. 148; *State v. Foley*, 15 Nev. 64; S. C., 37 Am. Rep. 458; 2 Crim. Law Mag. 127, 837. It clears the pardoned from the guilt of the offense; *Ex parte Hunt*, 10 Ark. 284; gives him a new character, and makes of him a new man: *State v. Baptiste*, 26 La. Ann. 134. It gives him a new credit and capacity: *In re Deming*, 10 Johns. 232, 483. Blackstone says: "The effect of such pardon by the king is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains his pardon; and not so much to restore his former as to give him a new credit and capacity:" 4 Bla. Com. 402. Thus a pardon renders the person pardoned a competent witness: *Anonymous*, 1 Vent. 349; *Rex v. Crosby*, 1 Ld. Raym. 39; S. C., 2 Salk. 689; *Rex v. Celier*, T. Raym. 369; *Rex v. Castlemain*, Id. 379; *Commonwealth v. Ohio & Pa. R. R.*, 1 Grant Cas. 329; *Hoffman v. Coster*, 2 Whart. 453; *State v. Dodson*, 16 S. C. 453; *Jones v. Harris*, 1 Strobb. 160; *Rivers v. State*, 10 Tex. App. 177; S. C., 3 Crim. Law Mag. 280; *State v. Blaisdell*, 33 N. H. 388; *Perkins v. Stevens*, 24 Pick. 277; *United States v. Jones*, 2 Wheel. 451. This rule is subject to an exception in the case of perjury; and in such a case the prisoner, although pardoned, is an incompetent witness: *Anonymous*, 3 Salk. 155; *Houtaling v. Kelderhouse*, 1 Park. Cr. 241; *Anonymous*, 1 Vent. 349. It was held in *Rivers v. State*, 10 Tex. App. 177; S. C., 3 Crim. Law Mag. 280, that it was only in cases of conviction for perjury or false swearing that a charter of pardon must specif-

ically restore competency. It was held, however, in *Rex v. Reilly*, 1 Leach, 454, that one convicted of taking a false oath, and who is pardoned before the judgment, is a competent witness against the person who suborned him to take the oath. A limited pardon remitting fine, imprisonment, and corporal punishment does not restore competency: *State v. Timmons*, 2 Harr. (Del.) 528; and a remission merely of the punishment does not restore competency: *Perkins v. Stevens*, 24 Pick. 277; and under the old constitution in California a pardon did not remove the disability to testify annexed by law to a conviction for felony: *Blanc v. Rogers*, 49 Cal. 15. In Rhode Island the pardoning power does not restore the privilege of voting: *Opinions of Judges*, 4 R. I. 583. And a pardon by the president of the United States does not remove disabilities imposed by state laws: 1 Bish. Crim. L., sec. 920; *Ex parte Hunter*, 2 W. Va. 122; consequently a pardon by the president of the United States does not restore to the prisoner or confer upon him the right of suffrage: *Ridley v. Sherbrook*, 3 Coldw. 569; but the contrary was held in *Jones v. Board of Registrars*, 56 Miss. 766; S. C., 31 Am. Rep. 385; and also in *Hildreth v. Heath*, 1 Ill. App. 82, it was held that a pardon by the president removed and cured disqualifications and ineligibilities to office in Illinois. As a pardon clears a convict not only of the punishment but of the guilt, an action lies for calling a man a thief after he has been pardoned: *Cuddington v. Wilkins*, Hob. 81; but in slander for accusing the plaintiff with having stolen an ax several years before form, one L., the defendant may defeat the action by proving the truth of the words, notwithstanding the plaintiff, after being convicted of the offense, was regularly pardoned: *Baum v. Clause*, 5 Hill, 196.

5. *Miscellaneous*.—A pardon takes away the privilege of a witness in not answering, so far as regards any risk of prosecution: *Regina v. Boyes*, 1 Best & S. 311. It restores him to his rights and duties as a parent, and he becomes entitled to the custody of his infant children who have been placed under the care of a guardian during his civil death: *In re Deming*, 10 Johns. 232, 483; but it does not affect or annul the second marriage of his wife, nor the sale of his property by persons appointed to administer on his estate, nor divest his heirs of interests acquired in his estate in consequence of his civil death: *Id.* 232. On conviction of a justice for felony, and a sentence forfeiting his office, a subsequent pardon neither avoids the forfeiture nor incapacity to act under his commission: *Commonwealth v. Fugate*, 2 Leigh, 724; and if a king present to a benefice on being entitled to it by a simoniacal contract, his presentee is not removed though the simony is pardoned: *Rex v. Turvil*, 2 Mod. 53; nor does a general pardon discharging the punishment inflicted on simony preclude the ordinary from inquiring into and depriving the incumbent of his office for that offense: *Smith v. Shelbourn*, Cro. Eliz. 685, 686. A pardon of a nuisance discharges the fine, but not the abatement: *Rex v. Wilcox*, 2 Salk. 458; and a pardon of an entry in trespass bars an action for damages: *Strickland v. Thorpe*, Yelv. 126. The fact that the plaintiff in error has received a pardon does not authorize the dismissal of his writ of error: *Eighmy v. People*, 78 N. Y. 330. A person engaged in the rebellion is liable to private individuals for acts of trespass committed while in the rebellion; and this right to recover damages exists notwithstanding the person who committed the trespass had been pardoned by the president: *Hedges v. Price*, 2 W. Va. 192; but where a defendant indicted, convicted, and punished for conspiracy to defraud the United States is pardoned, the pardon is a bar to a civil suit to recover, under section 3296 of the revised statutes, the penalty of double the amount of taxes of which the government

was defrauded: *United States v. McKee*, 4 Dill. 128; and the pardon of a distiller indicted and convicted for violation of the internal revenue laws is an effectual satisfaction of the sentence, and also operates as a complete release of the sureties on his bond from all liability for the same acts or breaches of duty charged in the indictment: *United States v. Cullerton*, 8 Biss. 166.

REVOCATION OF PARDON.—A pardon properly attested and delivered is irrevocable: *Ex parte Reno*, 66 Mo. 266; S. C., 27 Am. Rep. 337. After tender and acceptance, no subsequent action of the legislature can revoke it: *State v. Nichols*, 26 Ark. 74; S. C., 7 Am. Rep. 600. But until it is delivered it may be revoked: *In re De Puy*, 3 Ben. 307.

AMNESTIES.—"The word 'amnesty' does not, in legal language, differ greatly in meaning from 'pardon;' but it is not often if ever applied to a pardon granted to a single individual for an ordinary crime. It signifies a general pardon to rebels for their treason and other high political offenses, or the forgiveness which one sovereign grants to the subjects of another, who have offended by some breach of the law of nations. 'An amnesty,' says Vattel, 'is a perfect oblivion of the past:'" 1 Bish. Crim. L., sec. 898. "Amnesty differs from pardon in some essential particulars. It is addressed, not to an individual, but to a population; and it is as much in the nature of a compact as a grant. * * * Another chief point of distinction between pardon and amnesty is that the former merely relieves from the legal consequences of the guilty act, while the latter cancels the guilty act itself. It is an extinction even of the memory of the past—an *amnestia*—an act of oblivion. Hence amnesties are always construed indulgently towards those by whom they are accepted. *In dubio mitius* is a maxim which applies to them as well as to pardons. But to amnesties belong the additional consideration that no government, without forfeiting all confidence in its faith, can prosecute those whom it induces to surrender themselves to it on the plea that the offense prosecuted should be treated as if it did not exist:" 1 Whart. Crim. L., 7th ed., sec. 591 a. Those wishing to examine the questions arising under the amnesty proclamations issued during and subsequent to the late civil war are referred to the cases cited in 1 Bish. Crim. L., 7th ed., sec. 904, note 1.

DOE EX DEM. SMITH v. SMITH.

[1 JONES' LAW, 135.]

DEED EXECUTED UNDER POWER OF ATTORNEY AFTER DEATH OF PRINCIPAL has no effect, as the power of attorney is revoked by principal's death. **ESTATE CAN NOT BE CREATED BY MEANS OF GENERAL POWER OF APPOINTMENT** given in covenant "to stand seised" to uses, or in a deed of bargain and sale.

GENERAL POWER TO SELL LEASE, ETC., GIVEN TO STRANGER IN DEED to grantor's children is void, and a sale under such a power is of no effect.

EJECTMENT. Clara Thomas was seised of the premises in question, and in consideration of natural love and affection conveyed the same to her children Frances and Thomas. The deed contained the following clause: "But the property herein conveyed is, however, to be under the control and management of Alexan-

der M. High, for my said children, namely, to rent, lease, sell, or otherwise dispose of the same, say all or any part of said lots, houses, or other property hereby conveyed, as to him may seem most advantageous for my said two children, and to make such conveyances for the same as he may deem most advantageous for their promotion and benefit." After the death of Clara Thomas, High conveyed the premises to one Smith, who willed them to the defendant Penelope Smith. The children of Clara Thomas are the plaintiffs. The question in the case was as to the power of High. The court nonsuited plaintiffs, and they appealed.

Winston and Rogers, for the plaintiffs.

Moore and G. W. Haywood, contra.

By Court, PEARSON, J. Considering the authority given to High to sell the land and make a conveyance in the light of a power of attorney, the deed executed by him could have no effect, because it was made after the death of his principal, by which it was revoked. Considering it as a power of appointment under the doctrine of uses, it is equally imperfect, because it is well settled that an estate can not be created by means of a general power of appointment given in a covenant "to stand seised" to uses, or in a "deed of bargain and sale;" and the deed of Clara Thomas to her two children, in which the power is contained, must be either the one or the other of these conveyances.

1. Supposing it to be a "covenant to stand seised," that conveyance operates by a use being raised on account of a good consideration, and then the legal estate is carried to the person having the use, by force of the statute of uses: a use must first be raised, and that can only be done by a good consideration—natural love, for instance, between the covenantor and the person in whose favor it is to arise. Of course such a consideration can not exist where the appointee, or person to have the use, is at the time unknown, and may be any one whom the donee of the power may afterwards appoint; and although the appointee may happen to be one who is a kinsman of the covenantor, that will not suffice; for the consideration that will support a deed, when it requires a consideration, must exist at the time it is executed; otherwise the deed is deficient, and the accident of a consideration afterwards can not give to it any effect. This, however, is beside the question, for the appointee was not a kinsman of the covenantor. Although, as between

the donor and her two children there was a sufficient consideration to support the deed, and to raise the use limited to them, yet a good consideration is personal, and can not extend, for any purpose, beyond the party and the use limited to the party. If a parent covenants to stand seised to the use of a child for life, remainder to the use of a stranger, the remainder is void. The reasons apply with more force to future contingent uses, and with still more to such uses as are to be raised by a general power of appointment, although the power is given to the child: of course, to give such a power to a stranger is out of the question.

2. Suppose it to be a deed of "bargain and sale;" that differs from a "covenant to stand seised" only in this: that one requires a good and the other a valuable consideration; and the remarks made above apply, with a slight distinction growing out of the nature of the two kinds of consideration. And the difference is this: a good consideration, as before remarked, is personal; whereas a valuable consideration may be paid to the bargainor for and on account of another. So that although a covenant to stand seised to the use of a stranger in consideration of natural love for the child of the covenantee is void, yet a bargain and sale to B., in consideration of value paid by a stranger to the bargainor for and on account of B., raises the use, and the statute carries the legal estate. So if one, in consideration of value paid to him by A., bargains and sells to A. for life, remainder to B. in fee, it will be intended that A. paid the consideration as well on account of B. as for himself. But the person to whom it is limited must be named, for it can not be intended that a consideration was paid for and on account of an unknown person. For this reason, it is settled that a future contingent use to one unknown, or not *in esse*, can not be raised by a deed of bargain and sale. It is also settled that a use can not be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger, which is our case. For then the idea that any consideration moved from the unknown appointee to the bargainor is entirely out of the question. And it does not alter the case if after the appointee is known he should pay a valuable consideration to the bargainor; for the deed is absolutely void unless the consideration is paid or secured to be paid (which is the same thing) at the time the deed is executed.

It would be an idle display of learning to pursue this subject

further. Sir Edward Sugden in his treatise on powers discusses it fully, and it so clearly appears that, in regard to the question before us, there is no conflict of opinion. So it would seem useless to have said as much as we have but for the purpose of simplifying the subject and relieving it from that seeming confusion which is sometimes produced by too much learning.

In volume 1, page 85, he says: "A power in a bargain and sale to lease to any man, although for a valuable consideration to be paid or rendered, is too general, and therefore void." "So such a power in a covenant to stand seised is, for the same reason, void; nor is it any argument in favor of a lease under such a power that it is granted to some person within the consideration of blood, because, by reason of its generality, the power was void at the time the deed was executed." At page 86: "It seems clear that a power may be raised, in a bargain and sale, to lease to a person from or in behalf of whom a consideration moved at the execution of the deed: so a power may be raised in a contract to stand seised, to grant a lease to a person named in the deed, and within the consideration of blood or marriage, although such a lease can not be granted where a general power is reserved to lease to any man." In such cases, as Lord Chief Baron Gilbert has observed, "no use can arise; for when the persons are altogether uncertain and the terms unknown, there can be no consideration. If such cases could be supported, it might, on the same ground, be argued that contingent uses to persons not *in esse* could be raised in a bargain and sale, provided they paid a consideration when born. It is settled that such a general power is void in its creation." Saunders, in his treatise on uses and trusts, vol. 2, p. 42, says: "As no use can be limited to arise out of a use, it follows that a use can not be limited upon the legal estate of the bargainor so as to be executed by the statute; neither can there be a *scintilla juris*, or possibility of the seisin remaining in the bargainor, after the bargain and sale, to serve a use limited on a future event, because the consideration paid by or on account of the bargainee, and which constitutes the foundation of the bargain and sale, appropriates the use exclusively for his benefit. The limitation of the use to the bargainee is a consequence arising from the payment of the money, and beyond that limitation the original consideration and contract do not extend; therefore, if there be a bargain and sale for the use of the bargainee, with a power from him to make leases, a lease made under that power can not operate as an appointment of the use to the lessee."

The reason why these authors direct their attention almost exclusively to the power to make leases is because the question was settled at an early day against the power to sell, and has never since been agitated. But the power to make leases was so convenient and almost necessary, according to the condition of things in England, that it found some advocates—among others, Cruise. They, however, were forced to restrict it to leases where a full rent is reserved to be paid to the person having the first estate, and after its determination to the taker of the second estate. The admission of the necessity for this qualification yields the question; for evidently it is not the amount but the fact of the consideration that forms the basis of the doctrine: for the purpose of raising a use, one dollar is as effectual as one thousand.

If a general power to lease can not be given to one to whom the first estate is limited, *a fortiori* a general power to sell can not be given to a stranger. The whole subject is fully discussed in *Mildmay's Case*, 1 Co. 177.

Judgment reversed, and judgment for the plaintiffs, according to the case agreed.

ACTS OF AGENT, AFTER DEATH OF PRINCIPAL, VALIDITY OF: See *Dick v. Page*, 57 Am. Dec. 267, and note.

WHAT CONSIDERATION WILL SUPPORT COVENANT TO STAND SEISED: See *Corwin v. Corwin*, 57 Am. Dec. 453, and note. The language of the principal case was quoted in *Bruce v. Faucett*, 4 Jones L. 393; *Royster v. Royster*, Phill. L. 228.

POWER OF APPOINTMENT OR POWER OF SALE CAN NOT BE CREATED BY DEED of bargain and sale or covenant to stand seised; the principal case was cited to this point in *Latham v. Skinner*, Phill. Eq. 298; referred to on this point in *Levy v. Griffis*, 65 N. C. 239; and approved in *Hogan v. Strayhorn*, Id. 284.

WHITE v. CASTEN.

[1 JONES' LAW, 197.]

WILL IS NOT REVOKED BY ANY ACT OF SPOILIATION OR DESTRUCTION not deliberately done, *animo revocandi*.

WHERE REVOCATION OF WILL IS ATTEMPTED BY BURNING, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burned or singed, it is sufficient to revoke the will.

WILL IS REVOKED BY BURNING where the testator threw it into the fire with the intent to revoke and destroy it, and after he had turned away his wife took the paper from the fire secretly and concealed it; and the testa-

tor up to the time of his death thought the will was destroyed, and so frequently expressed himself, the script having been burned through in three different places, the outside scorched, and the edges of the paper singed, although no word or letter of the writing was in any manner destroyed or obliterated.

THIS was an issue of *devisavit vel non* as to the will of one T. J. White, propounded by his widow and opposed by Casten and his wife. The opinion states the facts.

Heath, for the propounders.

Bragg, Brooks, and Smith, contra.

By Court, NASH, C. J. The question for our consideration arises under the act of the general assembly concerning the revocation of wills: R. S., c. 122, sec. 12. By that section, it is provided "that no devise in writing, etc., or any clause thereof, shall be revocable, otherwise than by some other will in writing, or by burning, canceling, tearing, or otherwise obliterating the same," etc. This provision is almost in the exact terms of the statute of frauds in England, passed 29 Charles II. It was stated at the bar, in the argument here, that the true construction of the 29 Charles, upon the question raised here, was in England still unsettled, and that there was no adjudication by this court which was a direct authority. This is so, and we must endeavor to extract from the conflicting English authorities, and our own cases which have a bearing upon the question, that rule which appears to us most consonant with the statute and to reason. Revocation is an act of the mind, demonstrated by some outward and visible sign or symbol of revocation. No act of spoliation or destruction of the instrument will, under the statute, revoke it, unless deliberately done, *animo revocandi*. Thus if a testator, intending to destroy papers of no value, ignorantly and without an intention to do so, throws his will into the fire, and it is consumed, or by accident tears off the seal, it is no revocation. The difficulty lies in ascertaining how far the symbol of revocation must extend. As to the burning, must the will by it be literally destroyed, in whole or in part? or must any portion of it be actually destroyed? It is upon this point that the English cases differ. The first case to which our attention was directed was that of *Bibb d. Mole v. Thomas*, 2 W. Black. 1043. The case was: Palin, the deceased, being sick in bed, near the fire, ordered his attendant, Mary Wilson, to bring him his will, which she did. He opened it, looked at it, and tore a bit of it almost off, then

crumpled it in his hand and threw it on the fire. It fell off, and Mary Wilson took it up and put it in her pocket. Palin did not see her take it up, but had some suspicion of the fact, as he asked her what she was at, to which she made little or no reply. The court ruled that it was not necessary that the will or the instrument should be literally destroyed or consumed, burned or torn to pieces. Throwing it on the fire with an intent to burn, though it is but very slightly singed, and falls off, is sufficient within the statute.

The case does not inform us to what extent the fire had made an impression on the paper: it must have been very slight. The authority of this case is said to be shaken by what fell from Chief Justice Denman, in the case of *Doe d. Reed v. Harris*, 33 Eng. Com. L. 129. In commenting on the case of *Bibb d. Mole v. Thomas*, *supra*, he observes: "Doubt might be entertained now whether the proof there given would be sufficient as to these"—meaning burning and tearing. High as this authority is, we are not inclined from the expression of a doubt to set aside the deliberate and united opinions of Chief Justice De Grey, Gould, Blackstone, and Nares. But in that very case, both Patteson and Coleridge stated there must be a partial burning of the instrument itself, and that any partial burning will destroy it entirely. But independently of this, the case of *Bibb d. Mole v. Thomas*, *supra*, is recognized by writers of the highest authority. Mr. Powell, at page 596 of his treatise of devises, says: "Upon this principle, it has been held that if any of these acts, viz., tearing, burning, etc., be performed in the slightest manner, this, joined with a declared intent, will be a good revocation, because the change of intent is the substantive act, the fact done is only the sign or symbol by which that intent is rendered more obvious." He then cites the case of *Bibb d. Mole v. Thomas*, *supra*, as his authority. See also 1 Jarman on Wills, 115-119; Lovelace on Wills, 347. They both cite the case from Sir William Blackstone, and refer to the case of *Doe d. Reed v. Harris*, *supra*, as showing that the singeing of the cover of a will is not a burning of the will, but that there must be a partial burning of the will itself. Thus stand the cases in England on this question, and upon the authority of *Bibb d. Mole v. Thomas*, *supra*, Judge Kent, in the fourth volume of his Commentaries, page 532, says: "Canceling in the slightest degree, with a declared intent, will be a sufficient revocation, and therefore throwing a will on the fire with an intent to burn it, though it be but slightly singed, is sufficient evidence of the

intent to revoke;" and for this he cites *Bibb d. Mole v. Thomas, supra*. So Greenleaf, in his first volume on evidence, page 349, states that when a testator crumpled his will and threw it on the fire with an intent to destroy it, though it was saved entire without his knowledge, it would be a revocation, and refers to the case of *Bibb d. Mole v. Thomas, supra*, to sustain them. See *Card v. Grinman*, 5 Conn. 168.

By a large majority of these authorities, it appears that the case in Blackstone is sustained and approved. The intent with which the act is done by the testator must continue through the act; otherwise it will not be a revocation; as where a testator, upon a sudden provocation by one of the devisees, tore his will asunder, and after being appeased fitted the pieces together and expressed his satisfaction that it was no worse, it was held to be no revocation. Here the intent to revoke was itself revoked before the act was complete: *Doe v. Perkes*, 3 Barn. & Ald. 489. The case of *Hise v. Fincher*, 10 Ired. L. 139 [51 Am. Dec. 383], which was referred to, does not govern this. There the testator, who was sick in bed, directed his son to throw his will into the fire; instead of doing so, he, without his father's knowledge, threw another paper in. This was adjudged, and certainly very correctly, to be no revocation. The directions given were accompanied by no act or symbol on the part of the testator expressive of his intention to revoke: his intention rested only in words.

The principle which we would extract from the cases cited is that where the revocation of a will is attempted by burning, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burned or singed it is sufficient to revoke the will. Let us now try this case by this principle or rule.

The case states that the testator threw the will into the fire with the intent to revoke and destroy it; that after he had done so he turned away, when the plaintiff, his wife, took the paper from the fire secretly, and concealed it in her pocket; that the testator up to his death thought the will was destroyed, and so frequently expressed himself. The writing was upon a single sheet of paper, which was burned through in three places, one near either extremity, and in the crease formed by the folding of the paper. It was also singed at the outer edges, and scorched on the outside or back; this was done when the paper was

thrown on the fire. No word or letter of the writing was in any manner destroyed or obliterated by the burning, and the paper itself but little disfigured, and in no wise injured, except as above stated.

It will be at once seen that this is a stronger case than that of *Bibb d. Mole v. Thomas, supra*. There the script was barely singed; here it is burned through in three different places, the outside scorched, and the edges of the paper singed. We are therefore clearly of opinion that the will was revoked: there was the present intent to revoke—the act of throwing on the fire with that view, and the symbol impressed upon the script itself. There was no halting in the intention of the testator between the commencement and the completion of the act; for, to the time of his death, he believed the will was destroyed.

It is seen from the cases cited and the rule we have laid down, that the much or little of the burning of the script is not material, and when the reason of requiring the symbol to be impressed on the script is considered, it can not be important. The symbol is nothing but the act showing the intention of the testator, and when that appears on the paper, the evidence from the act is complete, and the testator has completed his intention. It would be singular that if the slightest burning of a house, on an indictment for arson, should be sufficient to take the life of the incendiary, as it is that a similar burning should not, in a civil case, be sufficient to revoke a will. The language upon this point in the act taking away the benefit of clergy for burning a jail or other public building is the same as in the act we are considering, R. S., c. 34, sec. 7: "If any person shall willfully and maliciously burn," etc. If any portion of the building is burned, it is sufficient to bring the case within the statute.

Judgment affirmed.

INTENT TO REVOKE WILL MUST APPEAR CLEARLY AND SPECIFICALLY
Wiloff's Appeal, 53 Am. Dec. 597, and note.

REVOCATION OF WILL BY BURNING: See *Hies v. Fischer*, 51 Am. Dec. 283; *Johnson v. Brailsford*, 10 Id. 601.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

DUPREE v. DUPREE.

[BUSBY'S EQUITY, 164.]

CHILD IN VENTRE SA MERE CAN NOT TAKE UNDER DEED OF GIFT to the donor's grandchildren.

THIS case was transmitted from the Pitt county equity court. The opinion states the case.

Moore and Winston, jun., for the plaintiff.

Rodman, contra.

By Court, PEARSON, J. On the ninth day of January, 1817, Patience Goff executed a deed by which, in consideration of natural love and affection, she gave and conveyed to her grandchildren, "Washington and Lewis Dupree, sons of Robert and Rachel Dupree, and to the next of their heirs lawfully begotten of their bodies (Peggy Ann Dupree only excepted), a slave named Rose." On the ninth day of October, 1817, the plaintiff, who is a child of the said Robert and Rachel Dupree, was born, and by this bill he claims one third of Rose and her increase.

It is conceded that no other after-born child of Robert and Rachel Dupree except the plaintiff could take under this deed of gift; and his claim is put upon the ground that he was *in ventre sa mere* at the date of the deed, and was in contemplation of law *in esse*, and capable of acquiring a right of property. For according to the calculation by the ordinary course of nature he was conceived six days before the date of the deed, and the question is, Can an atom, a thing in its mother's womb, six

days old, acquire a right of property by a common-law conveyance?

Such an idea may be consistent with the refinements of the civil law, or with the doctrine of uses and of executory bequests and executory devises, which is borrowed from the civil law, but is wholly at variance with the plain, direct, and tangible maxims of the common law; and its bare suggestion would have shocked the sages of that practical system of laws built up by immemorial usage and common custom, and having for its basis certain maxims, all of which rest upon the fundamental principle that property can not be acquired or lost except by some open, overt act palpable to the senses, about which there can be no mistake.

Property must at all times have an owner. One person can not part with the ownership unless there be another person to take it from him. There must be a "grantor and a grantee, and a thing granted." In considering the application of these maxims, the question may be disincumbered by leaving Washington and Lewis Dupree out of view, and considering the deed of gift as purporting to be made to the plaintiff. For he claims by purchase, as distinguished from descent, succession, or distribution, and must make his title clear upon an independent footing, being entitled to no aid from Washington and Lewis, as trustees for him, because there is not the slightest ground for putting them in that relation.

Suppose a case of land, which at common law could only pass by feoffment. To whom or to what could livery of seisin have been made? Who would have performed the services? Or take the case of a chattel. A gift must be accompanied by actual delivery. To whom or to what could the delivery be made? To a thing six days old in its mother's womb? And yet, unless the right of property passed at the date of the gift, it could not pass at all unless the donor chose afterwards to make a new gift. It is true that in conveyances to uses and in wills, which are governed by doctrines borrowed from the civil law, a great departure has been made from the maxims of the common law. For instance, a fee may be limited after a fee; a limitation over may be made in a chattel after giving a life estate; a freehold may be made to commence *in futuro*; and a springing, shifting, or contingent use may be made to arise at any time afterwards, provided it be not too remote. For inasmuch as the legal ownership passed to the trustee or the heir at law or executor, that was supposed to satisfy the rule of the

common law, which requires that property should at all times have an owner; and the use was left to be shifted about according to the intention of the grantor, until it became necessary that the use should draw to itself the legal estate, when it of necessity became fixed. By way of further illustration, a bequest or use limited to the children of A. passes only to such children as A. has at the time (and we will suppose a child *en ventre* would be included); but a bequest or use limited to the children of A., after an estate to her for life, remains open, so as to take in all the children she may have at her death. And this class of cases is put on the ground that by reason of the life estate it does not become necessary to fix the legal ownership until the death of the taker of the first estate. Again, by way of use or will, a limitation over in a chattel, after a life estate, may be made. This could not be done by a common-law conveyance, and can only be done now in regard to slaves by a special statute.

These instances show the difference between the rules applicable to a conveyance at common law and a conveyance under the doctrine of uses or of wills; and although in the latter there is a strong inclination—we may almost say a settled rule—to treat an infant *en ventre* as a thing *in esse*, yet no case can be found in which it was ever so treated in a common-law conveyance. Nor can it be so treated without breaking down the maxims of the common law.

“In respect of the grantee, three things are requisite: that he be a person in being at the time of the grant made (if he be to take immediately); if he be to take by way of remainder, it is not necessary that he should be in being.” But it is necessary that he should come into being during the continuance of the particular estate, or *eo instanti* of its termination: Shep. Touch. 235; Co. Lit. 2, 3; Perkins, sec. 43; Touch., c. 9, no. 4. “By the strict rule of law, if A. was tenant for life, remainder to his own eldest son in tail, and A. died without issue born, but leaving his wife *enceinte*, or big with child, and after his death a son was born, this son could not take by virtue of the remainder; for the particular estate determined before there was any person *in esse* in whom the remainder could vest.” To remedy this, the statute 10 & 11 Wm. III. allows remainders to vest in children while yet in their mother’s womb: 2 Bla. Com. 169, and note. That statute is confined to remainders. There is no statute which enables children while yet in their mother’s womb to take directly by a deed of gift at common law.

“If a woman be quick with child, and by a potion killeth it in her womb, or if a man beat her, whereby the child dieth in her body, this is a great misprision, but no murder. But if the child be born alive and dieth of the potion or the battery, this is murder, for it is accounted *in rerum natura* when it is born alive. If a man counsel a woman to kill the child within her womb when it shall be born, and after she is delivered of the child she killeth it, the counselor is accessory to the murder; and yet at the time of the counsel no murder could be committed of the child *in utero matris*, because it was not *in rerum natura*.” 3 Co. Inst. 50. These authorities show conclusively what is the common law upon this subject, and by that this case must be decided.

Mr. Moore cited several authorities; among others, Macpherson on Infants, and the cases there referred to, 25 Law Lib., N. S., 565. They only show that in regard to the declaration and limitation of uses, and in regard to legacies, the courts of equity and the ecclesiastical courts have adopted the rule of the civil law, by which an infant *en ventre* is considered as born. Among other instances given by Macpherson—a man may surrender copyhold land immediately to the use of an infant *en ventre sa mere*, “for a surrender is a thing executory, and nothing vests before admittance.” This last expression explains that case. The title of the surrender vests in a third person until the infant is born and becomes capable of taking an estate.

We have no sort of doubt that Mrs. Goff intended all the children of Robert and Rachel Dupree (Peggy Ann excepted), without reference to the time of their birth, to be participants of her bounty; and the only regret is that she did not call upon a lawyer, who would have drawn a conveyance passing the property to a trustee, by which the uses could have been kept open until the death of Mrs. Dupree, so as to let in all of her children. But she chose to make a common-law conveyance directly to the children; and of course no other could take under her deed of gift except those *in esse*, or as my Lord Coke expresses it, *in rerum natura*, when the right of property passed out of her, to wit, at the date of the deed of gift. The owners were then called for—it was then necessary for them to take the property. The plaintiff could not answer the call, and there is no rule of the common law by which we can give him another day.

It is unnecessary to notice the other questions.

Bill dismissed, with costs.

CHILD EN VENTRE SA MERE, WHEN REGARDED AS IN ESSE.—This subject is discussed in the note to *Harper v. Archer*, 43 Am. Dec. 472. A conveyance in trust for a woman and her children, she having children at the time, nothing appearing on the face of the deed to show a contrary intent, was held to vest an estate in the mother and the children then born, and in one *en ventre sa mere*, as tenants in common, but that the children born after were not entitled to it. The court referred to the principal case, and said it did not conflict with the views there laid down.

MAY v. SMITH.

[BUTLER'S EQUITY, 196.]

ADMINISTRATOR CAN NOT JOIN COUNT FOR DEBT DUE HIM INDIVIDUALLY with one in his representative capacity, either at law or in equity.

ALL PERSONS INTERESTED IN SUBJECT-MATTER OF SUIT MUST BE MADE PARTIES.

ASSIGNOR OF BOND MUST BE MADE PARTY IN ACTION AGAINST ASSIGNEE calling him to account for it by one claiming to be entitled to the bond. In such a case it is not a sufficient answer that the assignor is dead and that there is no personal representative, as it is the duty of the party seeking relief to procure a representative, and it is therefore no answer for the plaintiff that he is the representative.

BILL in equity. The opinion states the case.

Winston, for the plaintiff.

Dargan and Kelly, contra.

By Court, NASH, C. J. The bill can not be sustained in its present form. It is filed by Peter May, as the administrator with the will annexed of Reading Anderson, and part of the prayer is, "that the defendants may account with the plaintiff for the assets of the deceased in their hands;" and another prayer is, that the defendants may account "for the effects belonging to your orator deposited in their hands by the deceased." Here are two distinct and independent causes of action united: one to call in and collect the assets of the deceased; and the other to follow the effects of the plaintiff, effects due to him individually and in his own right. At law, an executor or administrator can not join a count for a debt due to him individually with one in his representative capacity. Neither can they be joined in equity: *Adams' Eq.*, 2d ed., 567; *Davoue v. Fanning*, 4 Johns. Ch. 199; *Bedsole v. Monroe*, 5 Ired. Eq. 315. And the reason assigned is, that different decrees and proceedings might be required; for convenience, therefore, the joinder will not be permitted. For this cause the defendant might have demurred.

Waiving, however, this objection, the case has been put, in the argument before us, upon the second ground. The bill, in the stating part, alleges that the deceased, Reading Anderson, was the agent of the plaintiff to carry on the business of selling groceries, and that the plaintiff furnished all the capital. It then states "that he [the plaintiff] was the owner of a tract of land, which he authorized the deceased to sell, which he did to one McKorkle, and took in payment the bond of Joseph Blair, with the indorsement of McKorkle, and which he, Anderson, indorsed and delivered to the defendant Mrs. Paul." The bill claims this bond as belonging to the plaintiff individually, upon the ground that the land was his. Upon this ground alone the case has been argued before us. Waiving all remarks upon the suspicious nature of the whole connection between Anderson and the plaintiff in this business, and looking upon the bill *pro hac vice* as filed by Peter May to follow this bond into the hands of Mrs. Paul and her husband, Mr. Paul, has the plaintiff entitled himself to a decree? We think not. It is a general principle in equity that all persons interested in the subject-matter in dispute must be made parties. The bond was by McKorkle, the obligee, indorsed to Anderson, and by him indorsed to Mrs. Paul. By these several indorsements the legal title to the instrument is in the defendant Mr. Paul. In calling him to account for it, his assignor is a necessary party, because the defendant Paul would be entitled to redress out of him.

The reason of the general rule above stated is, that a court of equity seeks to arrange by one suit all the claims arising out of the same transaction between the parties interested. The defendants, then, are entitled to have the representative of Reading Anderson before the court, in order that their respective rights and interests growing out of the transaction may be settled. Another reason is, that the estate of Anderson is primarily answerable, and the defendant's secondarily. If the representative of Anderson was properly before the court, and the plaintiff entitled to a decree, the decree would be that it should be discharged in the first place out of his estate, and if there were no assets, or not sufficient, then by the defendant Paul: *Powell v. Matthis*, 4 Ired. L. 84 [40 Am. Dec. 427]; *Murphy v. Moore*, 4 Ired. Eq. 118; *Hoyle v. Moore*, Id. 175. It is objected on the part of the plaintiff May that he is the representative of Anderson, and that he could not make himself a defendant. But who has placed him in that position? It was his own voluntary act, and he must abide the consequence.

It is no sufficient answer to the objection for the want of parties that one interested is dead and there is no personal representative. It is the duty of those seeking relief by bill in equity in a matter in which the deceased person is interested to procure a representative, and it can therefore be no answer for the plaintiff that he is the representative: *Martin v. McBryde*, 3 Ired. Eq. 531. Further, he has not averred a want of assets. On the contrary, an inventory has been filed as an exhibit, showing that he has in his hands, of the deceased Anderson's effects, more than the amount of his claims, and out of which he has a right of detainer.

The truth is, the bill is so singularly constructed that no relief can be had under it.

Bill dismissed, with costs.

NECESSARY PARTIES, GENERALLY: See *Bofl v. Fisher*, 55 Am. Dec. 627; *Cole v. Robertson*, Id. 784; *Watts v. Steele*, 54 Id. 207; *Batterton v. Chiles*, Id. 539; *Hopkins v. Hopkins*, Id. 663; *McMahan v. McMahan*, 53 Id. 481; *Moor v. Veazie*, 52 Id. 655; *Hightower v. Thornton*, Id. 412; *Union Bank v. Powell's Heirs*, Id. 367; *Robinson v. Collier*, Id. 572; *Clark's Heirs v. Farrow*, Id. 552; *Vance v. Blair*, 51 Id. 467; *Jones v. Blanton*, Id. 415; *Carter v. Jones*, 49 Id. 425; *Montandon v. Deas*, 48 Id. 84; *Plowman v. Riddle*, Id. 92; *Trimble v. Boothby*, 45 Id. 526; *Roberts v. McLean*, 42 Id. 529; *Leigh v. Smith*, Id. 183, and note; *Patton v. Magrath*, 33 Id. 98.

CREDITORS CAN SUE ONLY THROUGH REPRESENTATIVE OF DECEASED: See *Worthy v. Johnson*, 52 Am. Dec. 399.

LYERLY v. WHEELER.

[BUSEY'S EQUITY, 267.]

GENERAL CHARGE OF COMBINATION, COLLUSION, AND FRAUD, no matter how often intimated, does not give plaintiff any ground to stand on in a court of equity; he must bring his case within some distinct principle or head of equity jurisdiction.

FRAUDULENT COMBINATION TO KEEP PLAINTIFF OUT OF POSSESSION IS NOT COGNIZABLE IN EQUITY, where the plaintiff has not established his title at law, and no irreparable injury is threatened.

TO ENTITLE ONE TO BILL OF PEACE, the complainant must satisfactorily establish his title at law.

INJUNCTION AGAINST DESTRUCTIVE TRESPASS DOES NOT LIE when complainant has not established his title at law, and no irreparable injury is threatened.

QUESTION WHETHER CONVEYANCES ARE FRAUDULENT AS TO CREDITORS under the statute of Elizabeth, when presented collaterally in a suit already constituted in a court of equity, is one which that court will either decide or have tried at law; but equity will not take a distinct and independent jurisdiction, unconnected with any other equitable in-

gradient, in order to try a mere question of fraud against creditors, as the latter have a clear remedy at law.

IN March, 1843, plaintiff filed a bill against the defendant Wheeler, and in June, 1848, obtained a decree for a large sum, upon which execution issued, and the house and lot in question were sold, and purchased by the plaintiff, who sued out a writ of possession. Wheeler, in April, 1843, conveyed the premises by deed of trust to secure certain indebtedness to one Locke, and in 1848 Locke conveyed them to Chaffin. The latter brought ejectment against Wheeler, obtained judgment by default, and took out a writ of possession. This writ was sued out after the plaintiff's. Wheeler was all the time in possession of the premises, and Locke and Chaffin are his brothers-in-law. The plaintiff alleges that the deeds from Wheeler, Locke, and from the latter to Chaffin were fraudulent; that a combination existed between the three to deprive plaintiff of the benefit of his writ of possession; that the judgment by default was taken and Chaffin's writ sued out with the fraudulent intention of ejecting the plaintiff on his taking possession. The bill prayed for an injunction restraining Chaffin and his confederates from interrupting the execution of plaintiff's writ of possession by executing his fraudulent writ, and that the plaintiff be quieted in his possession under his writ when obtained. The defendants alleged that the deeds were *bona fide* and for valuable consideration. Chaffin alleges he was willing Wheeler should continue in possession until he had a good opportunity to sell; he denies any fraudulent combination, and avers a willingness to have conflicting claims settled in action at law. The court dissolved the preliminary injunction granted, and the plaintiff appealed.

Craige, for the plaintiff.

Boyden, *contra*.

By Court, PEARSON, J. We might content ourselves with affirming the order dissolving the injunction on the ground that the allegations of the bill are fully answered; but that might tempt the plaintiff to proceed with his bill, in the hope of being able to disprove the answers, and thus costs would be incurred unnecessarily; for which reason we think it best to put our decision on the ground that, according to the plaintiff's own allegations, he does not entitle himself to the interference of a court of equity.

A general charge of combination, collusion, and fraud, no

matter how often intimated, does not give a plaintiff any ground to stand on in a court of equity; he must bring his case within some distinct principle or head of equity jurisdiction. Admit that there is a combination between Chaffin and Wheeler, by which the latter is to be allowed to remain in possession as long as he can hold off the plaintiff, and the former is to be ready to interfere and turn the plaintiff out as soon as he shall take possession under his writ, and put Wheeler back into the possession again; and that Chaffin took the judgment in the action of ejectment in order to have a writ of possession ready for that purpose—and the question is, Does the plaintiff's case fall under the head of any equity jurisdiction? The answer is, It does not, for two reasons—the plaintiff has not established his title at law, and no irreparable injury is threatened.

From the special prayer that the plaintiff may be quieted in his possession, when he obtains it under his writ of possession, and that the defendants may be enjoined from depriving him of such possession by executing their false and fraudulent writ of possession, the idea seems to have been that the plaintiff's case falls either under the head of a "bill of peace" or of "injunction against destructive trespass."

In regard to the former, it is settled, "where the plaintiff has, after repeated and satisfactory trials, established his right at law, equity will interfere to suppress future litigation of the right." "However, courts of equity will not interfere in such cases before a trial at law, nor until the right has been satisfactorily established at law. But if the right is satisfactorily established, it is not material what number of trials has taken place, whether two only, or more:" Story's Eq. Jur., sec. 859.

In regard to the latter, it is settled, "an injunction will lie for protection of a title admitted or proved at law, whenever the act complained of is not a mere ouster or temporary trespass, but is attended with permanent results, destroying or materially altering the estate; as, for example, if a man be pulling down his neighbor's house, or the like. If it be a mere ouster or temporary trespass, the recovery of the land by an action of ejectment, or of damages by an action of trespass, are sufficient remedies, and an injunction will not lie:" Adams' Eq. 210, and note thereto; "there must be something particular in the case, so as to bring the injunction under the head of quieting the possession, or preventing irreparable injury," for which *Livingston v. Livingston*, 6 Johns. Ch. 497 [10 Am. Dec. 353], is cited.

The plaintiff's proper course, therefore, was to take possession under his writ, and if Chaffin ousted him, the remedy was to bring an action of ejectment against Chaffin, in which the title at law could be tried. Until the plaintiff does try his title at law, no matter what he may allege as to combination and conspiracy to disturb his possession and interfere with his enjoyment of the property, equity can not interfere; for until then he has not shown himself entitled to the possession of the property, and consequently he has nothing for a court of equity to protect.

From the general prayer with which the bill concludes, it may be that the plaintiff supposed he had a right to relief in equity upon the ground that the deed from Wheeler to Locke was fraudulent as to creditors, and the deed from Locke to Chaffin was also fraudulent as to creditors; and so both deeds were void under the statute of Elizabeth. If so, the plaintiff has a clear remedy at law. The real matter of contention between him and Chaffin is whether the deeds under which the latter claims are fraudulent as to creditors. That depends upon the intent with which they were executed, and is a matter peculiarly fit for the investigation of a jury. It is true, when a question of the kind is presented collaterally in a suit already constituted in a court of equity, that court will either decide it or have it tried at law; but the court will not take a distinct and independent jurisdiction, unconnected with any other equitable ingredient, in order to try a mere question of fraud against creditors under the statute of Elizabeth, because it is purely a legal question.

It is proper to add that both defendants fully deny the allegations of fraud in reference to these deeds, and aver that they were executed *bona fide*, and challenge the plaintiff to a trial of that issue before a jury.

Interlocutory order dissolving the injunction affirmed.

COURTS OF LAW AND EQUITY HAVE CONCURRENT JURISDICTION IN CASES OF FRAUD: *Rogers v. Brent*, 50 Am. Dec. 422, and note.

BILL IN EQUITY TO SET ASIDE FRAUDULENT CONVEYANCE, whether creditor must exhaust legal remedy before filing bill: See *Chautauque Co. Bank v. White*, 57 Am. Dec. 442, and note; *Meux v. Anthony*, 52 Id. 274, and note.

BILLS OF PEACE.—This subject is discussed in the note to *Woodward v. Seely*, 50 Am. Dec. 445.

INJUNCTION AGAINST TRESPASS, WHEN GRANTED: See *White v. Flannigan*, 55 Am. Dec. 668, and note. The principal case was cited in *Thompson v. McNair*, Phill. Eq. 124, on the point that courts of equity interfere reluctantly in applications for special injunctions to restrain trespass, and never

unless it was apparent that but for such interference the injury would be irreparable, and that no redress could be obtained at law.

INTERFERENCE OF EQUITY WHERE LAW AFFORDS ADEQUATE RELIEF: See *Doggett v. Hart*, 58 Am. Dec. 464; *De Witt v. Hays*, 56 Id. 352; *Bradford v. Greenway*, 52 Id. 203; *Garvin v. Squire*, 50 Id. 224; *Bank of Utica v. Mersereau*, 49 Id. 189. Where plaintiff alleges that he signed and sealed, but never delivered, a writing purporting to be a deed for certain land, but that defendant fraudulently got possession of the writing, and by color of it committed trespass on lands, to his damage, etc., equity will not take cognizance of the cause, as the remedy is at law: *Ryland v. Curran*, 64 N. C. 357, citing the principal case.

WRIGHT v. BOWDEN.

[1 JONES' EQUITY, 15.]

BILL LIES TO EXECUTE DECREE where, owing to the neglect of the parties to proceed under it, their rights have become embarrassed by subsequent events, and a new decree is necessary to ascertain them, and where the decree is not unjust or inequitable.

BILL to execute a decree. The opinion states the case.

O. G. Wright, for the plaintiff.

Winslow, contra.

By Court, NASH, C. J. The bill is to execute a decree heretofore made in the court of equity for Duplin county. The defendants file a general demurrer, and the cause is transferred by consent to this court for argument.

The facts of the case, as admitted by the demurrer, are as follows: The plaintiff was appointed executor of the will of James Wright, deceased, and trustee for his children. The testator died in the year —, and the plaintiff was duly qualified as his executor; the will disposed of both real and personal property among testator's children, one of whom was John Beck Wright. A bill was filed by the present defendants, Daniel Bowden and Loftin, as purchasers of the equitable interest of John B. Wright in certain slaves bequeathed to the complainant in trust for him, and by the other legatees and devisees under the will of James Wright, praying for a determination of the trust and due delivery of the property. John Beck Wright became lunatic pending the bill, and by his committee Robert T. Murphy was, by a supplemental bill, made a party. At a subsequent term of the court, by an interlocutory order, commissioners were appointed to divide the lands and slaves among the claimants; and "it is further ordered and decided by the

court, that the part or portion of the real estate allotted to John B. Wright be allotted and set apart, subject to a claim which Isaac Wright, trustee, has against the said John B. Wright for two hundred and thirty-one dollars, with interest, etc., the said lien having accrued to said Isaac Wright, he having purchased a claim set up to John B. Wright's interest in said lands, to prevent litigation and the title from being clouded." The report of the commissioners was duly made and returned to the spring term, 1851, of Duplin court of equity, where the following decree was made: "The cause coming on to be heard on the bill, etc., it is ordered by the court that the report, as returned, be confirmed in all things, and it is ordered and adjudged and decreed that lot No. 1 be assigned to Robert T. Murphy for the use of John B. Wright, a lunatic, Robert T. Murphy being his guardian or committee; and it is considered by the court, and it is hereby decreed that lot No. 1, described by the commissioners in the report to this term, be and remain liable for the sum of two hundred and thirty-one dollars, with interest from the nineteenth of February, 1849, due to Isaac Wright, as appears in the interlocutory order of the last term of this court. The said lot No. 1 to be and continue responsible for the above-mentioned sum until the same is paid." By the same decree Isaac Wright was discharged from his trust. Subsequently thereto, John Wright was, by an inquisition *de inquirendo lunatico*, found to be of sound mind, and he sold the defendants Bowden and Loftin lot No. 1.

The decree above set forth is still in force, and never has been performed. No part of the money decreed to Isaac Wright has been paid to him. This bill is to execute it.

In a bill to execute a decree, the principle of that decree is its basis, and it seeks merely to carry it into effect. Such a bill may be filed where an omission has been made in consequence of all the facts not appearing on the record: *Hodson v. Ball*, 1 Phill. L. 181. Or where, owing to the neglect of parties to proceed under it, their rights have become embarrassed by subsequent events, and a new decree is necessary to ascertain them: *Mitford on Pleading*, 95. The plaintiff in such a bill can not impeach the decree. If it goes beyond the execution of it, it is a bill to impeach. The defendant, however, is under no such restriction, and may show that it ought not to be executed. If, however, it can be enforced under the ordinary process, it will be assumed to be correct. But the court can, in respect of the special application, examine the decree, and if it be unjust, re-

fuse its aid: *Id.* 97; 2 Daniell's Ch. Pr. 1407; *Hamilton v. Houghton*, 2 Bligh, 169. As before remarked, the decree sought to be executed by these proceedings is still in force. We have examined it, and see in it nothing unjust or inequitable. The plaintiff, as trustee of John B. Wright, advanced the sum decreed him for and on account of his *cestui que trust*, to quiet his title to the land in question, and there is certainly no injustice on his part in asking, or the court in decreeing, the repayment of it. It was necessary for the plaintiff to ask the aid of the court. New parties had become interested, namely, the defendants Bowden and Loftin, by virtue of their purchase from John B. Wright, after he had been duly declared not to be a lunatic. All these facts are admitted by the demurrer.

Demurrer overruled.

YATES v. COLE.

[JONES' EQUITY, 110.]

WILL CAN NOT BE CORRECTED BY EVIDENCE OF MISTAKE, so as to strike out the name of a legatee and insert that of another inadvertently omitted by the drawer or copyer; for there can be no revocation or alteration of a written will of personalty without the statutory forms, and the disappointed intention has not these forms.

TESTIMONY TO REFORM INSTRUMENT IN FAVOR OF MERE VOLUNTEER must be something more than mere declarations; but must be proof of facts and circumstances *dehors* the instrument and inconsistent with it.

BILL to reform a will. The opinion states the case.

Banks and Kelly, for the plaintiffs.

Winslow and Strange, contra.

By Court, BATTLE, J. The object of the bill is to obtain the aid of a court of equity for the purpose of reforming the will of the testator, Daniel McRae, so as to take from the defendant Lucy Diggs certain slaves therein bequeathed to her by mistake as alleged, and give them to the *feme* plaintiff, for whom it is said they were intended. This object, if attained at all, must be accomplished by a parol revocation of the bequest of the said Lucy, and then by a nuncupative will giving it to the said *feme* plaintiff. Can this be done? No authority has been produced by the plaintiffs' counsel to show that it can, and we think there is a very strong and decisive reason why it can not. Adams, in his treatise on equity, after stating the doctrine in relation to the reformation of instruments *inter vivos*, says, at page 172,

that "a will can not be corrected by evidence of mistake, so as to supply a clause or word inadvertently omitted by the drawer or copyer; for there can be no will without the statutory forms, and the disappointed intention has not those forms." For this he cites *Newburgh v. Newburgh*, 5 Madd. Ch. 364; Jarm. Wills, sec. 121; 8 Vin. Abr. 188, G, a, pl. 1. To the same effect is 1 Story's Eq. Jur., sec. 181. Jarman says that the case of *Newburgh v. Newburgh*, *supra*, was carried to the house of lords, and there approved by the unanimous opinion of all the judges. The reason given why a court of equity declines to interfere when called on to reform a will would seem to restrict it to a devise of real estate. But the principle is certainly applicable to the will in this case, though it be but a bequest of personalty. In the thirteenth section of the statute concerning wills, 1 R. S., c. 122, it is enacted that "no will in writing, passing or bequeathing a personal estate of greater value than two hundred dollars, or any clause thereof, shall be revocable, otherwise than by some other will or codicil, or other writing declaring the same, or by canceling," etc.; and "no written will, passing or bequeathing a personal estate of two hundred dollars or less shall be altered or revoked by a subsequent nuncupative will, except the same be in the life-time of the testator reduced to writing, and read over to him and approved," etc.

It is obvious that with a slight change of the phraseology quoted from Adams and taken substantially from the opinion of the vice-chancellor in the case of *Newburgh v. Newburgh*, *supra*, we may say here, that the will can not be corrected by evidence of mistake, so as to strike out the name of the legatee and insert that of another inadvertently omitted by the drawer or copyer; for there can be no revocation or alteration of a written will of personalty without the statutory forms, and the disappointed intention has not these forms.

Such would be our conclusion in this case were the evidence of the mistake satisfactory; but it may not be improper for us to declare that were the legal objection removed, the testimony of the plaintiffs would be insufficient to entitle them to the relief which they seek.

Without going fully into the subject, it may suffice to say that the testimony to convert a deed, absolute on its face, into a mortgage (an instrument founded on a valuable consideration) must be something more than mere declarations: must be proof of facts and circumstances *dehors* the deed, inconsistent with the idea of an absolute purchase: See *Sowell v. Barrett*, Busb. Eq.

50, and the cases there referred to. The testimony to reform an instrument in favor of a mere volunteer could not of course be less.

The bill must be dismissed with costs.

PAROL EVIDENCE OF MISTAKE IN WILL: See *Gifford v. Dyer*, 57 Am. Dec. 708, and the cases cited in the note. Where a testator intending by his will to ratify and confirm parol gifts of slaves long before made to two of his sons, by mistake describes the slaves that had been given to one son as those given to the other, and *vice versa*, the court will declare the testator's intention to have been according to the dispositions by parol gifts: *Lowe v. Carter*, 2 Jones Eq. 377, citing the principal case.

REFORMATION OF CONTRACTS: See *Leitensdorfer v. Delphy*, 55 Am. Dec. 137; *Stone v. Hale*, 52 Id. 185; *Leavitt v. Palmer*, 51 Id. 333; *Harris v. Col. C. M. I. Co.*, Id. 448.

PELHAM v. TAYLOR, EXECUTOR.

[1 JONES' EQUITY, 121.]

EXECUTOR CAN NOT RETAIN LEGATEE'S SHARE to secure payment of annuity, nor require security for its payment, when a testator bequeathed a certain annuity to his wife, and it was agreed that each legatee pay semi-annually a certain amount to discharge it.

EXECUTOR HAS NO RIGHT TO REQUIRE BOND FOR FORTHCOMING OF PROPERTY given to one for life, with a remainder over; that must be given at the instance of the remainderman if there be good ground to fear that the property will be destroyed or taken to parts unknown; *a fortiori* the executor can not require a bond where the property is given with the absolute power of disposition.

EXECUTOR WILL NOT BE ALLOWED HIS COSTS in an action for refusing to come to an account and to deliver over the property, where his reasons for refusing are entirely untenable.

R. TAYLOR on his death left, among other descendants, the defendant R. P. Taylor and two grandchildren, the complainant Pelham and his sister Susan, the children of a deceased daughter. The deceased bequeathed an annuity to his wife, and divided the rest of his estate among his children and Pelham and Susan, the last two taking a share equal to the share of one of the children. He provided in relation to the shares of the grandchildren that they should be held in cross-remainders in case either should die without issue surviving, and that in case of the death of the survivor without issue and intestate, his or her share, with the accumulation, should go to the other children or grandchildren, the latter taking *per stirpes*; the testator also declared that he did not intend to prevent the survivor from

disposing of it in any manner he or she saw fit. The limitation over was itself subject to a limitation in favor of the husband or wife of the survivor, and such person was to receive the share allotted to him or her by law. R. P. Taylor and others were appointed executors, and R. P. Taylor was also appointed guardian for complainants. A sum was set apart by the executors to pay a certain portion of the wife's annuity, and it was agreed each legatee should pay a certain sum towards it annually. Susan died under age and unmarried. Pelham, on attaining his majority, called upon R. P. Taylor for a settlement, and the latter refused to settle unless he was allowed to retain sufficient to pay the plaintiff's portion of the annuity, or unless the latter provided for its payment. The executor also questions whether he should not require security for the forthcoming of the property in the case of Pelham's death without issue and intestate. The case was removed by consent.

No counsel for the plaintiff.

Lanier, contra.

By Court, PEARSON, J. Two questions are presented: 1. There is no doubt that in pursuance of the arrangement by which the property came into the hands of the defendant, as guardian, the plaintiff is bound to secure the semi-annual payment of two hundred dollars to the widow of the testator during her life, that being his ratable part of the annuity not otherwise secured. This he may do, either by bond with personal security, or by a conveyance of a part of the property sufficient for that purpose, as may be arranged between the parties. 2. The plaintiff, as survivor, is entitled to the share given to himself and his sister, together with any accumulation thereon, and takes the absolute property therein, with the right to dispose of it as he may see proper, by will or otherwise, subject only to a limitation over to the children and grandchildren (who may be the children of any deceased child, and are to take by stocks or *per stirpes*) of the testator, in the event of his dying intestate and without leaving a child living at his death, which limitation over is itself subject to a limitation to the wife of the plaintiff, if he should marry, of such share as she would be entitled to by law in the event of his dying intestate, leaving a widow.

When the case was opened, a very interesting question was suggested, that is: Is not the limitation over void, as being repugnant to the absolute right of disposition? The case was

held under an *advisari*, to consider of this question. We are satisfied the question is not presented as the case now stands, and therefore are not at liberty to decide it; for, suppose the limitation over is not void, it is very clear that the plaintiff is entitled to have the property delivered over to him, to be disposed of as he may think proper, without giving security for its forthcoming.

If property be given to one for life, with a remainder over, the executor has no right to require a bond for its forthcoming. That must be obtained at the instance of the remainderman, if there be good ground to fear that the property will be destroyed or taken to parts unknown; *a fortiori* the executor can not require a bond, where the property is given with the absolute power of disposition. The only contingency in which the question as to the repugnancy of the limitation over can ever be presented, is the death of the plaintiff intestate, without a child and without having disposed of the property. Should all of these doubtful events happen, and the plaintiff have creditors who have acquired no specific lien on the property, they may raise the question as to the validity of the limitation over. We will not speculate on such remote possibilities.

The plaintiff is entitled to an account if he desires it. His rights will be declared as above. It is usual in such cases to decree the costs to be paid out of the fund, but the defendant's grounds for refusing to come to an account, and deliver over the property, are so untenable, particularly as no difficulty was made in regard to securing the ratable part of the annuities, that we do not allow the defendant his costs.

Decree accordingly.

COSTS AGAINST EXECUTOR: See *Chase v. Lockerman*, 35 Am. Dec. 277; *Turnham's Ex'x v. Shouse*, 33 Id. 473, and note.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WETMORE v. MELL.

[1 OHIO STATE, 20.]

DECLARATIONS OF PARTY ARE ADMISSIBLE AS PART OF RES GESTÆ, if made at the time of an act done by him, and explanatory thereof, where evidence of such act is itself admissible.

ADMISSION OF IMPROPER DECLARATIONS WILL NOT BE PRESUMED, when it is not made to appear by the bill of exceptions that they were admitted.

ERROR to the court of common pleas of Mahoning county. The declaration was for a breach of promise of marriage, to which there was a plea of the general issue. The plaintiff below had a verdict, and the defendant moved for a new trial, which motion was overruled by the court. The bill of exceptions showed that the plaintiff below introduced evidence tending to prove that the defendant had kept her company for several years; that the plaintiff and the defendant were mutually attached to each other; and that the plaintiff had begun preparations for marriage by procuring bedding, etc. Evidence was then offered by the plaintiff of her own declarations made to her sister during the preparations, for the purpose of showing the mutuality of the contract, the plaintiff's counsel claiming that from the facts and circumstances proved a promise on the defendant's part might be inferred. The defendant's counsel objected to the plaintiff's declarations for any purpose; but the objection was overruled by the court, and the declarations were admitted, not for the purpose of proving the contract, but to show its mutuality, if the jury were satisfied that a contract on the part of the defendant had been proved. The errors assigned

by the defendant below were: 1. That the court permitted the said evidence to go to the jury; 2. That the judgment was manifestly against the evidence; 3. That the judgment was for the plaintiff when it should have been for the defendant.

Wilson and Church, and John Hutchins, for the plaintiff in error.

Birchard, J. L. Ranney, and Newton and Estep, for the defendant in error.

By Court, CORWIN, J. As the evidence on the trial below is not presented in the record, the second error assigned presents no question for our consideration.

The third error assigned depends upon the determination of the first, no other exception to the judgment being taken, and we are brought to the question whether the court erred in admitting the declarations of the plaintiff, under the circumstances, and for the purposes stated in the bill of exceptions.

It is undoubtedly true, as a general rule of evidence, that the statements of a party in regard to the subject-matter of his own suit are inadmissible unless introduced by his adversary; but this rule is necessarily subject to many exceptions, and the admission or rejection of such testimony must in some measure depend upon and be governed by the nature of the case, and of the facts to be proved. Thus, it has been frequently held that when one enters into land, in order to take advantage of a forfeiture, to foreclose a mortgage, to defeat a disseisin, or the like; or where one changes his residence, or is upon a journey, or leaves his home, or returns thither, or remains abroad, or secretes himself, or does any act material to be understood, his declarations, made at the time of the transaction, and expressive of its character, motive, or object, are regarded as "verbal acts, indicating a present purpose and intention," and are therefore admitted in proof, like any other material facts, leaving their effect to be governed by other rules of evidence: 1 Greenl. Ev., sec. 108, and authorities there cited. So the state of mind, sentiments, or disposition of a person at any particular period may be ascertained from his declarations and conversations at that time: *Barthelemy v. People*, 2 Hill (N. Y.), 248, 257.

And no objection can exist to the admissibility of such evidence, so long as the statements and declarations thus introduced are concomitant with and explanatory of the act or occurrence to which they relate. In *Sessions v. Little*, 9 N. H.

271, it is held that "where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*." But the reason of this rule by no means applies to such statements as are merely narrative of a past occurrence, and they are clearly inadmissible.

In the case under consideration, the plaintiff's acts of preparation for the marriage were not objected to, and were properly admitted as evidence of her acceptance of defendant's promise to marry her. And why exclude her statements at the time, explanatory of such acts of preparation? The latter are no more likely to be deceptive than the former, but are the more reliable and satisfactory because they are a distinct, express, and binding admission of what would only be otherwise ascertained by inference from unexplained acts.

Such statements, if made after a rupture between the parties, for obvious reasons would be inadmissible, but the plaintiff in error has not shown by his bill of exceptions that the declarations so admitted were made at such a time or under such circumstances, and in the absence of such showing we will not presume that the court below admitted such improper declarations. We can only correct such errors as are made to appear.

It is contended by counsel for plaintiff in error that the statements of the party were admitted by the court to show the "mutuality of the contract," and that as mutuality is an essential element of every contract, evidence to establish the mutuality is evidence to establish the contract itself, and that it was therefore improperly admitted. The language by which the object of the evidence is expressed in the bill of exceptions may not be of the happiest selection, but the principle involved is quite clearly shown, and we do not stop to deal with the words in which it is set forth. The defendant's promise was shown by other distinct facts and circumstances, and it was proposed to show plaintiff's acceptance of it by her preparation for marriage, together with her statements to her sister explanatory thereof, and for this purpose only was the evidence admitted by the court. The cases of *Hutton v. Mansell*, 6 Mod. 172, and *Peppinger v. Low*, 1 Halst. 384, are in point, and fully sustain the decision of the court below. The rule of evidence there established for this description of cases is so reasonable in itself, and the reasons by which it is maintained are so consistent with the habits and customs of society and the obvious pro-

prieties of life, and have for so long a time secured the sanction and approval of courts of justice, that we are unwilling to disturb it. And when we consider the peculiar nature of the contract thus sought to be established, and the circumstances of secrecy and confidence with which it is usually made and observed in civilized life, such acts and declarations as were admitted in evidence in this case are frequently the only, and ordinarily the best and most satisfactory, evidence of the existence of such an engagement. We are unanimous in the opinion that there was no error in the ruling of the court below, and its judgment is therefore affirmed with costs.

RANNEY, J., having been of counsel, did not sit in this case.

DECLARATIONS OF PARTY ARE ADMISSIBLE AS PART OF RES GESTÆ, if made at the time of an act done by him: *Ross v. Bank of Burlington*, 15 Am. Dec. 664; *Kimball v. Huntington*, 25 Id. 590; *Deming v. Carrington*, 30 Id. 591; *Crump v. United States Mining Co.*, 56 Id. 116; *McCartney v. State*, Id. 510; but see *Taylor v. Adams*, 7 Id. 665. But in *Kyle's Adm'r v. Kyle*, 15 Ohio St. 19, 20, where the question was whether the defendant's intestate held possession of a mare as the plaintiff's vendee or bailee, it was held that the declarations of the decedent made at the time he was offering the mare for sale, that he was her owner, were inadmissible; the court saying of the principal case, on its being cited in favor of the admissibility, that in it the declarations were held admissible only for the purpose of showing the plaintiff's acceptance of the defendant's promise.

DECLARATIONS OF THIRD PERSONS, WHEN ADMISSIBLE: See *Kilburn v. Ritchie*, 56 Am. Dec. 326, and note collecting prior cases. The principal case was cited in *Western Ins. Co. v. Tobin*, 32 Ohio St. 100, to the point that statements accompanying acts, and explanatory of them, are *res gestæ*, and therefore competent testimony.

PRESUMPTION EXISTS IN FAVOR OF COMPETENCY OF EVIDENCE where it does not appear by the bill of exceptions what evidence was given: *Vass v. Commonwealth*, 24 Am. Dec. 695; and under similar circumstances, a like presumption exists against the admissibility of evidence: *Doe v. Reagan*, 33 Id. 466.

XX

TRACEY v. SACKET.

[1 OHIO STATE, 54.]

REVERSAL OF DECREE UPON BILL OF REVIEW WILL NOT BE JUSTIFIED by mere difference of opinion as to the weight of the evidence.

ACTUAL FRAUD IS NOT ESSENTIALLY NECESSARY IN ORDER TO SET ASIDE CONTRACT IN EQUITY. The acts and contracts of persons of weak understanding, and who are therefore liable to imposition, will be held void if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence.

CONTRACT MAY BE SET ASIDE IN EQUITY where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration; or where there is weakness of mind and circumstances of undue influence and advantage.

BILL in chancery. It appears from the bill, answer, and testimony before the master that the complainant, Skene D. Sacket, conveyed to the defendant, Tracey, his farm of eighty acres of land, certain personal property, and a pension of ninety-six dollars a year, in consideration of which Tracey gave to Sacket a writing by which he covenanted and agreed for himself, his heirs, executors, and administrators, that he would "provide the said S. D. Sacket and Lorilla, his wife, with food and raiment, and everything necessary to their very comfortable existence and support, during each of their natural lives; and should any difficulty grow out of this arrangement, any and all such questions and difficulties are to be decided on principles of equity." Sacket and his wife, under this arrangement, occupied a small log-house near Tracey's residence, and there lived in a frugal manner, provisions being furnished by Tracey in small, and at times insufficient, quantities. They also rendered Tracey certain services, in the way of taking care of a small dairy, boarding hired hands, chopping wood, and the like; although Tracey claimed that they consented to and even solicited the services thus imposed. At the end of eighteen months Sacket and his wife abandoned the house, and refused to further depend upon Tracey for their support, assigning as a reason that the latter had not faithfully complied with the contract on his part. At the time the arrangement was entered into, Sacket was about eighty years old, occasionally addicted to intemperance, had shortly before had a severe attack of sickness, and was, withal, of such weak mind that he was incompetent to manage his own affairs, and easily controlled by others. Sacket owed about three hundred dollars, of which one half was due Tracey; and before the arrangement was made, the latter informed the former that some means must be taken to secure the latter's debt, and proposed the plan entered into. Tracey appeared to be reluctant to make the arrangement, but his reluctance was of such a character that Sacket was favorably impressed with the idea. Tracey was said to have remarked on one occasion that his mind was so absorbed in making property that he had in some measure neglected his religious duties, and explained how he should make one thousand dollars out of Sacket, the worst way he could fix

it. The parties were in no way related. The decree, without any special finding of the facts, set aside Sacket's conveyance of the land to Tracey, required the latter to account for the rents and profits of the same while in possession, and for the personal property received by him, and credited him for the maintenance furnished. A bill of review was filed, and it was assigned as error: 1. That the conveyance was set aside without any proof of fraud on Tracey's part, or imbecility on the part of Sacket, in making the same; 2. That the master's report was confirmed when the report was not only unsupported by testimony, but was in direct opposition to the most plain and positive proof; 3. That the court found the equity of the case with Sacket when, according to the proof, it was with Tracey.

Crowell and R. Hitchcock, for the complainant.

Simonds and Cadwell, for the defendant.

By Court, BARTLEY, J. The errors assigned are founded in matters of fact, and this court would not be disposed to disturb a decree resting upon facts which have been once found, except in a very clear case. Mere difference of opinion as to the weight of the evidence would not justify the reversal of a decree upon a bill of review: *Buckley v. Gilmore*, 12 Ohio, 75.

But we see no difficulty in sustaining this decree upon the facts of the case. The contract between Tracey and Sacket was of such a nature as would be properly regarded by any court of equity with scrutinizing jealousy. It is said by Justice Story that courts of chancery acting upon an enlarged equity, flowing from the principles of natural justice, will afford protection to the necessitous and those approaching to an incapacity to bind themselves by a contract, against the designs of calculating rapacity, which the law constantly discountenances. To maintain this contract, on the part of Tracey, in a court of equity, even if divested of all circumstances of fraud or imposition, would require of him the utmost good faith in the making of the contract, and a strict performance, characterized by a benevolent regard for the welfare of those who were committed to his charge.

The proof of actual fraud upon the part of Tracey, or of insanity on the part of Sacket, was not essentially necessary in order to set aside the contract. It appears to be well settled, as a general rule, "that the acts and contracts of persons who are of weak understandings, and who are thereby liable to im-

position, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence:" *Gartside v. Isherwood*, 1 Bro. C. C. 560; 1 Story's Eq. Jur., sec. 238. It is laid down in case of *Cruise v. Christopher's Adm'r*, 5 Dana, 181, that mental imbecility, not amounting to absolute disqualification, induces a vigilant and strict examination in chancery of the contracts made by one laboring under it; and when coupled with inadequacy of consideration, they constitute such evidence of fraud as may be sufficient to set aside a contract.

It is settled in *Whitehorn v. Hines*, 1 Munf. 557, that where one of weak intellect, though not an idiot, was induced to make a deed through the undue influence of one in whom he placed confidence, the deed was set aside. And it is laid down in the case of *Buffalow v. Buffalow*, 2 Dev. & B. Eq. 241, that a conveyance obtained from a man of weak mind, by taking advantage of confidence reposed by him in the grantee, will be set aside, although the grantor is not *non compos*.

The case of *Dunn v. Chambers*, 4 Barb. 376, was a bill in equity for relief against an improvident sale, and the evidence being found insufficient to justify a decree declaring the deed void, as having been fraudulently obtained, yet having been obtained under such circumstances as to render it at least unfair and unreasonable for the defendant to retain the full advantage of his bargain, the court may direct that the deed shall stand only as security for the defendant's indemnity in respect of the sum actually advanced.

It is said that a court of equity will not measure the size of men's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity; and that the law will not relieve a man who is capable of taking care of his own interest, except where he is imposed on by deceit, against which ordinary prudence could not protect him. But whatever weight this may be entitled to, and whatever may be its application, it is obvious that weakness of mind may constitute a very important circumstance to prove that a contract has been obtained through fraud, imposition, or undue influence. The strongest minds can not always protect themselves against deceit and artifice. The law requires that good faith should be observed in all transactions between man and man. And those who, from imbecility of mind, are incapable of guarding them-

selves against fraud and imposition are under the special protection of the law.

The rule to be collected from all the authorities I take to be this: Where there is imbecility or weakness of mind, arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration, or where there is weakness of mind, and circumstances of undue influence and advantage, in either case a contract may be set aside in equity.

Applying this rule, there is no difficulty in sustaining this decree on the evidence in this case. There was great weakness of mind on the part of Sacket, arising from extreme old age, increased perhaps by intemperance and sickness. There was clearly an inadequacy of consideration; and an overreaching and undue influence, and an unconscionable advantage on the part of Tracey, which, in a court of equity, fully justified the setting aside of the contract. Besides this, there was not that strict and full compliance with the terms of the contract on the part of Tracey which good faith and the policy of the law required at his hands in a contract of this nature.

The terms of the contract required him not only to provide Sacket and his wife with food and raiment, "but everything necessary for their very comfortable existence and support." And the nature of this contract required of him in the performance on his part a kind and benevolent regard for their dependent situation. He had no right to reduce them to a state of servitude. True, he claims they consented to and even solicited the services imposed on them. This excuse is easily made by a person having the control he had, from his position, over aged and weak-minded persons.

The fiduciary situation assumed by him in the contract enjoined upon him an entirely different course of treatment; and instead of having his mind fixed upon the matter of speculating and making property out of the arrangement, to the neglect of his religious duties, his attention should have been directed to the making of a suitable provision for the dependent persons taken by him under his control.

It is the opinion of the court that the decree carried out the stipulation of the contract which required "all questions or difficulties to be decided on principles of equity."

The bill is therefore dismissed.

RANNEY, J., having been of counsel, did not sit in this case.

MERE DIFFERENCE OF OPINION AS TO WEIGHT OF EVIDENCE WILL NOT JUSTIFY REVERSAL OF DECREE on a bill of review: *Gazley v. Huber*, 3 Ohio St. 399, 403, following and approving the principal case; and in *Grant v. Ludlow's Adm'r*, 8 Id. 41, the principal case was cited, *per* Bartley, C. J., dissenting, as settling this point.

CONTRACTS, WHEN SET ASIDE IN EQUITY FOR CONSTRUCTIVE FRAUD: See the question discussed in general in the note to *Hough's Adm'rs v. Hunt*, 15 Am. Dec. 572. For imbecility or weakness of mind: *Bunch v. Hurst*, 5 Id. 551; note to *Jackson v. King*, 15 Id. 361; *Holden v. Crawford*, Id. 700; *Owings' Case*, 17 Id. 311; *Crane v. Conklin*, 22 Id. 519; *Underwood v. Brockman*, 29 Id. 407; *Smith v. Beatty*, 40 Id. 435; *Juzan v. Toulmin*, 44 Id. 448. Undue influence: *Bunch v. Hurst*, 5 Id. 551; *Hough's Adm'rs v. Hunt*, 15 Id. 569, and note; *McCants v. Bee*, 16 Id. 610; *McKinney v. Pinckard*, 21 Id. 601; *Crane v. Conklin*, 22 Id. 519; *Stewart v. Stewart*, 23 Id. 396; *Underwood v. Brockman*, 29 Id. 407. Old age: *Owings' Case*, 17 Id. 311; *Smith v. Beatty*, 40 Id. 435. Intoxication: *Wigglesworth v. Steers*, 3 Id. 602; note to *Wade v. Colvert*, 12 Id. 655; *Crane v. Conklin*, 22 Id. 519; *Heirs of French v. French*, 31 Id. 441. Inadequacy of consideration: *Pollard v. Lyman*, 2 Id. 63; *Bunch v. Hurst*, 5 Id. 551; *Osgood v. Franklin*, 7 Id. 513; *Woodfolk v. Blount*, 9 Id. 736; *Beard v. Campbell*, 12 Id. 362; *Hough's Adm'rs v. Hunt*, 15 Id. 569, and note; *Holden v. Crawford*, Id. 700; *McCants v. Bee*, 16 Id. 610; *Owings' Case*, 17 Id. 311; *McKinney v. Pinckard*, 21 Id. 601; *Crane v. Conklin*, 22 Id. 519; *Stewart v. Stewart*, 23 Id. 396; *Juzan v. Toulmin*, 44 Id. 448; see also the note to *Kuykendall v. McDonald*, 57 Id. 217, and see *Thompson v. Jackson*, 15 Id. 721. In *Reid v. Burns*, 13 Ohio St. 60-62, where a rescission of a contract of support and reconveyance of the land was sought because of the grantee's abandonment of the contract and refusal further to perform it, the principal case was commented upon as being a case where a court of equity ordered the rescission of a similar contract, and a reconveyance, after a substantial performance on the part of the grantee during a period of nearly two years. See *Falls v. Carpenter*, 28 Am. Dec. 592, as to the cancellation of a contract on the ground of default and abandonment.

URMEY'S EXECUTORS v. WOODEN.

[1 OHIO STATE, 160.]

JURISDICTION OVER CHARITABLE TRUSTS EXISTS IN COURTS OF CHANCERY, independently of the statute of charitable uses, 43 Elizabeth.

VALID CHARITABLE TRUST IS CREATED, both under the doctrines of the adjudged cases and under section 13 of the Ohio act for the relief of the poor, where a testator gives and devises the remainder of his estate "to the poor and needy, fatherless, etc.," of two designated townships, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality."

BILL in chancery, filed by the executors of the will of John Urmev, invoking the aid of the court as to the disposition of the residue of the fund in their hands arising from the sale of the testator's property under the will. The various claimants to the

fund, including the widow of the testator, who had subsequently intermarried with Wooden, are made parties to the bill. The names of these claimants, and the residuary clause of the will under which the question in the case arose, appear in the opinion. John Q. Urmev, the testator's illegitimate son, claims that he was recognized in a previous clause of the will as the son and heir at law of the testator.

Eli J. Forsythe, for the trustees.

Lowe and Boothe, for John Q. Urmev.

Haynes and Howard, for the heir at law.

Henry Stanbery, for Wooden and wife.

By Court, RANNEY, J. Four separate claims are made in this case to the fund brought into court by the executors of Urmev: it is claimed by the trustees of Jefferson and Madison townships, for the poor of those townships, under the provisions of the will; the widow claims it as next of kin; the brothers and sisters of Urmev as his heirs at law, he having left no legitimate child; and lastly, John Q. Urmev, his illegitimate son. The claim of the trustees is based upon the residuary clause in the will of Urmev, which is in these words: "The remainder of my estate I do hereby give and devise to the poor and needy, fatherless, etc., of Jefferson and Madison townships, of the county aforesaid; to such poor as are not able to support themselves, to be divided as my executors may deem proper without any partiality." It is contended by them that this is a valid bequest for a legal, charitable, and meritorious object. This claim is resisted by all the other parties, and the bequest is claimed to be "utterly uncertain and indefinite as to the objects of the bequest, and therefore void." If this bequest can be sustained, it disposes of the whole fund, and renders it unnecessary to consider the conflicting claims of the other parties; and we are all of opinion that it is not of a character to require or authorize us to defeat the intention of the testator. Although the jurisdiction of courts of chancery over charitable bequests of this character has been the subject of much controversy, it seems to have been always agreed from an early period in the Roman law to the present time that such gifts are to receive a most liberal construction: 2 Story's Eq. Jur., sec. 1139; *Witman v. Lex*, 17 Serg. & R. 88 [17 Am. Dec. 644]; *Trustees of McIntire Poor School v. Zanesville C. & M. Co.*, 9 Ohio, 287 [34 Am. Dec. 436]; *Zanesville Can. & Man. Co. v. City of Zanesville*, 20 Id. 483.

Whatever might have been the course pursued by the courts of chancery in England prior to the passage of the statute of charitable uses, 43 Elizabeth, which I do not propose to examine, it is unmistakably clear that since that time their whole jurisdiction has been regarded as resting upon it, and they have uniformly refused to interfere in cases not falling within its provisions. That statute has been construed with almost extravagant liberality, and it is not doubted that this case would fall within its provisions; but inasmuch as that statute is not in force here, it is hence inferred that our courts are invested with no such power. This consequence by no means follows. On the contrary, many of its principles have been long since incorporated into American jurisprudence, and enforced by the decisions of the highest and most enlightened courts. These decisions very conclusively settle the case under consideration.

In the case of *Witman v. Lex*, 17 Serg. & R. 88 [17 Am. Dec. 644], the bequest was of a sum of money to two churches to lay out the interest annually in bread for the poor of the congregation. This bequest was sustained by Chief Justice Gibson in a very masterly opinion covering the whole ground. He arrived at the conclusion that it was immaterial whether the persons to take were *in esse* or not, or whether the church was then a corporation or not, or how uncertain the objects might be, provided there was a discretionary power vested anywhere over the application of the testator's bounty to the objects intended—that if the intention sufficiently appeared in the bequest it would be held valid. These principles were also enforced by the supreme court of the United States in the case of *Inglis v. Sailor's Snug Harbour*, 3 Pet. 99, in which a bequest to the chancellor of New York, and others in trust, to erect an asylum for the purpose of supporting aged, decrepit, and worn-out sailors, was sustained; see also, to the same purport, *Moore's Heirs v. Moore's Devisees*, 4 Dana, 355.

Our own court, in the case of *Trustees of McIntire Poor School v. Zanesville Canal & Manufacturing Co.*, 9 Ohio, 287 [34 Am. Dec. 436], have been no less explicit. The devise in that case was for the purpose of establishing a school for poor children within the town of Zanesville. This devise was claimed to be void for uncertainty, as to the objects intended to be benefited. But the court sustained it, and remark that “where a trust is plainly defined, and a trustee exist capable of holding the property and executing the trust, it has never been doubted

that chancery has jurisdiction over it, by its own inherent authority."

In this case, the property is by the will expressly vested in the executors, and they are made trustees to apply the fund, from time to time, to relieve the necessities of the poor and needy in the townships named. The trustees exist to take and hold the property, and they are charged to seek out and apply it to the objects of the testator's bounty. These objects are as clearly pointed out as the nature of the case will admit, and as little as possible left to the discretion of his trustees.

But if we were in doubt as to the doctrines of the adjudged cases, we certainly could not err in the light of our own legislation. By the thirteenth section of the act for the relief of the poor, passed in 1831, it is provided: "That all gifts, grants, devises, and bequests hereafter to be made of any houses, lands, tenements, rents, goods, chattels, sum or sums of money to the poor of any township, by deed, gift, or by the last will and testament of any person or persons, or otherwise, shall be good and valid in law; and shall pass such houses, lands, tenements, rents, goods, and chattels to the trustees of such townships and their successors in office, for the use of their poor respectively, under such regulations as shall from time to time be made by law:" Swan's Stat. 637.

These provisions have been upon our statutes substantially since 1795. It can not be doubted that if this bequest had been made directly to the poor of the townships named, it would have taken effect under this section, and vested the property in the trustees of those townships in trust for the use of the poor. To prevent a failure of these charitable bequests, the statute has designated a trustee where none is named to hold and apply the fund. Just what the statute has done in such case, the testator has himself done in this. It does not need, therefore, the aid of the statute. But it would certainly present a strange anomaly for the legislature to provide that the least certain of these bequests should "be good and valid in law," and this court at the same time hold the more certain "utterly void." Wherever the spirit and policy of our legislation leads, the judicial tribunals are bound to follow; and we think this consideration alone entirely decisive of this case.

It is suggested that the trustees in this case should be changed. The papers present no reason why this court should interfere with the appointment made by the testator himself. If for any reason hereafter the trust shall not be faithfully executed, the

court of chancery in the county will possess full power to remedy the defect so as to carry into full effect the intention of the testator; for no trust can fail for the want of a trustee.

A decree can be taken upon these principles.

BEQUESTS TO CHARITABLE USES, WHEN VALID: See *Bartlet v. King*, 7 Am. Dec. 99; note to *Dashiell v. Attorney General*, 9 Id. 583; *Griffin v. Graham*, Id. 619; *Coggeshall v. Pelton*, 11 Id. 471; *McGirr v. Aaron*, 21 Id. 361; *Gass v. Wilhite*, 26 Id. 446; *Going v. Emery*, Id. 645; *Burr v. Smith*, 29 Id. 154; *Moore's Heirs v. Moore's Devisees*, Id. 417; *Sanderson v. White*, Id. 591; *Curd v. Wallace*, 32 Id. 85; *Reformed Protestant Dutch Church v. Mott*, Id. 613; *Curling's Adm'rs v. Curling's Heirs*, 33 Id. 475; *Trustees of McIntire v. Zanesville Canal and Man. Co.*, 34 Id. 436; *Burbank v. Whitney*, 35 Id. 312; *Shields v. Jolly*, 42 Id. 349; note to *Bridges v. Pleasants*, 44 Id. 98; *Wade v. American Colonization Society*, 45 Id. 324. When invalid: *Dashiell v. Attorney General*, 9 Id. 572, and note; *Greene v. Dennis*, 16 Id. 58; *McAuley v. Wilson*, 18 Id. 587; *Gallego's Ex'rs v. Attorney General*, 24 Id. 650; *Methodist Church v. Remington*, 26 Id. 61; *White v. Attorney General*, 44 Id. 92; *Bridges v. Pleasants*, Id. 94, and note. The principal case was cited in *Williams v. First Presbyterian Society*, 1 Ohio St. 502, as approving *Trustees of McIntire v. Zanesville Canal and Man. Co.*, *supra*.

JURISDICTION OVER CHARITABLE TRUSTS EXISTS IN COURTS OF CHANCERY, independently of the statute of charitable uses: *Griffin v. Graham*, 9 Am. Dec. 619; *Witman v. Lex*, 17 Id. 644; *Burr v. Smith*, 29 Id. 154; *Moore's Heirs v. Moore's Devisees*, Id. 417; *Reformed Protestant Dutch Church v. Mott*, 32 Id. 613; *Shields v. Jolly*, 42 Id. 349; and see *Zimmerman v. Anders*, 40 Id. 552; *contra*: *Dashiell v. Attorney General*, 9 Id. 572; but see the note thereto, p. 577. The principal case is cited to the foregoing proposition in *Jackson v. Phillips*, 14 Allen, 577.

STATUTE OF CHARITABLE USES EXISTS IN CERTAIN STATES: See the note to *Dashiell v. Attorney General*, 9 Am. Dec. 577. The statute exists in Kentucky: *Gass v. Wilhite*, 26 Id. 446; *Moore's Heirs v. Moore's Devisees*, 29 Id. 417; and see *Curling's Adm'rs v. Curling's Heirs*, 33 Id. 475; in Massachusetts: *Going v. Emery*, 26 Id. 645; *Sanderson v. White*, 29 Id. 591; *Burbank v. Whitney*, 35 Id. 312; in North Carolina: *Griffin v. Graham*, 9 Id. 619; but not in Maryland: *Dashiell v. Attorney General*, 9 Id. 572; nor in Pennsylvania: *Witman v. Lex*, 17 Id. 644; *Methodist Church v. Remington*, 26 Id. 61; but see *Zimmerman v. Anders*, 40 Id. 552; nor in New York: *Reformed Protestant Dutch Church v. Mott*, 32 Id. 613; nor in Virginia: *Gallego's Ex'rs v. Attorney General*, 24 Id. 650; and whether it exists in Mississippi is doubtful: *Wade v. American Colonization Society*, 45 Id. 324.

BANK OF WOOSTER v. STEVENS.

[1 OHIO STATE, 23.]

USURY OR OTHER ILLEGALITY IN OBLIGATION IS NO DEFENSE TO CREDITOR'S BILL, brought by a judgment creditor to enforce satisfaction of his judgment recovered upon such obligation. The judgment can only be impeached upon a direct proceeding brought to reverse or annul it.

CREDITOR'S bill to subject certain equities of the defendants to the payment of a judgment against them in favor of the complainants. The judgment had been recovered upon the record of a judgment, which had been entered upon a warrant of attorney, without notice to the defendants. The defendants set up, by way of defense, that more than six per cent interest had been included in the bond on which the judgment was originally taken; and two of the defendants, who were sureties for the third, Stevens, alleged that they had no knowledge of the usury until after the rendition of the judgment. Exceptions to the sufficiency of the answers were made by the complainants, but the court of common pleas having overruled them, they filed a replication. The bill was dismissed at the hearing, and the judgment at law vacated. On appeal, the exceptions to the answers were urged in the district court, and the cause was thereupon reserved for the decision of the supreme court.

E. Dean and N. H. Swayne, for the complainants.

Canfield and Kimball, for the defendants.

By Court, RANNEY, J. In the view taken by the court in this case, it becomes necessary to decide but a single question. Where a judgment creditor brings a creditor's bill to enforce satisfaction of his judgment by charging equities, can the judgment debtor be permitted to show in defense that the contract upon which the judgment was rendered was infected with usury or other illegality? The defendants place themselves upon this ground alone, and excuse themselves from further answering upon the assumption that this is a perfect answer to the equity of the bill, when coupled with the fact that they were not advised of the usury until after the rendition of the judgment at law. In support of this position, they insist that, while it is true that a party invoking the aid of a court of equity to be relieved from usury can only do so upon paying what is equitably due, yet as a defendant, he may insist upon it as a perfect defense in equity as well as at law; that the illegality of the contract will constitute a sufficient reason why a court of equity will not lend its aid to enforce it. This is undoubtedly generally correct; and it is equally true that if the obligation upon which this judgment is founded was tainted with usury, it was absolutely void for the want of corporate power in the plaintiff to make it: *Bank of Chillicothe v. Swayne*, 8 Ohio, 257 [32 Am.

Dec. 707]; *Creed v. Commercial Bank of Cincinnati*, 11 Id. 489; *Rains v. Scott*, 13 Id. 107.

But all this does not come to the point in hand. The question here is, Can the party be permitted to go back of the judgment in a proceeding brought to enforce it, and aver and prove such illegality? It certainly can not be necessary at this day to cite authorities to show that the judgment of a court of competent jurisdiction can not be impeached collaterally. It is a record of the highest character, importing absolute verity, and works a conclusive estoppel upon parties and privies to aver or prove anything against it. It speaks for itself, and when it has spoken, the parties to it at least are bound to be silent. Without overturning the very foundations of the law, we are bound to hold that it can only be impeached upon a direct proceeding brought to reverse or annul it. The difficulty here is not that a court of chancery can not refuse to enforce a usurious obligation when that is proved, but it arises from the fact that the defendants are conclusively estopped from proving it against the judgment. While that stands unreversed and in force, no evidence can be received to impair the absolute verity which it imports. If instead of this proceeding to obtain satisfaction of the judgment an action at law had been brought upon it, I do not suppose it would be contended that a plea setting up usury in the obligation upon which it was founded could be sustained; and yet it would not differ from the present attempt.

The power of a court of equity to allow such a defense is not more comprehensive than that of a court of law; and certainly a judgment when thus used is not less sacred in the one tribunal than in the other.

We have examined all the cases cited by the defendant's counsel, and can find nothing in any of them which militates against these views, unless a single remark made by the chancellor in *Fanning v. Dunham*, 5 Johns. Ch. 122 [9 Am. Dec. 283], can be regarded as doing so. He is there reported to have said that "if the party claiming under a usurious judgment or other security resorts to this court to render his claim available, and the defendant sets up and establishes the charge of usury, the court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever infected with usury." So far as concerns attempts to enforce any security in its nature disputable, or where the consideration may under the rules of law be inquired into, the doctrine is undeniably correct; but I do not

think that eminent jurist intended here to deny what he has again and again, both as judge and commentator, laid down as to the inviolability of judgments. I think the word "judgment" was incautiously or inconsiderately used, and I am strengthened in this conclusion from the fact that the remark had nothing whatsoever to do with the case before him.

The bill in that case was filed directly to impeach a judgment containing usury rendered upon a warrant of attorney, and to set aside a foreclosure and sale of mortgaged premises by a power contained in the mortgage.

The bill was entertained for the reason that the courts of law in New York, in opposition to their former practice, had come to the determination not to open such judgments upon motion; but relief was denied because the complainant had not offered to pay what was equitably due. No question, therefore, could have arisen as to the effect of the judgment when not thus directly attacked.

In the case of *Henry v. Vermillion & Ashland R. R. Co.*, 17 Ohio, 187, an attempt was made to impeach the judgment upon which the proceeding was founded for fraud, but the court held that it could not be done. Nor does this view of the matter deprive the defendant of all remedy.

It has long been the unquestioned doctrine in this state that judgments rendered upon warrants of attorney may on motion, upon a proper case being made, be opened, and the party let in to defend.

And in this case, as the claim has passed into a second judgment, and the defendants allege that they were ignorant of the existence of the usury until after it was obtained, and inasmuch as the complainant has come into equity to enforce it, we are of opinion that a cross-bill may be filed to set aside the judgment upon such terms as the relation of the defendants to the matter will entitle them to assume.

The complainant will have leave to withdraw the replication to the answer, and renew the exceptions, which will be sustained, and the cause remanded to the county for further proceedings.

JUDGMENT WHETHER IMPEACHABLE IN CREDITOR'S SUIT: See *Garland v. Rives*, 15 Am. Dec. 756; also *Candee v. Lord*, 51 Id. 294. In *Mattingly v. Nye*, 8 Wall. 373, the principal case is cited to the point that in a creditor's suit, if there is any ground of equitable relief against the judgment, it should be presented by a cross-bill or other proper proceeding had directly to affect the judgment; and in the analogous case of an application by a creditor for *mandamus* against county officers to levy a tax to pay a judgment, it is also cited to the point that the judgment can not be collaterally

questioned by setting up that interest was improperly given in it; it can be impeached only in a proceeding had directly for that purpose: *Supervisors v. United States*, 4 Id. 444. As to a judgment in general being subject to a collateral attack, see *Ralston v. Wood*, 58 Am. Dec. 604, and cases in the note thereto.

MISCELLANEOUS CITATIONS OF THE PRINCIPAL CASE.—Under the former practice in Ohio, judgments rendered upon warrants of attorney may on motion, upon a proper case being made, be opened, and the party let in to defend: *Bank of Cadiz v. Slemmons*, 34 Ohio St. 150; and a judgment may be set aside upon a cross-bill in a proceeding to enforce it: *Conway v. Duncan*, 28 Id. 106; and see *Mattingly v. Nye*, 8 Wall. 373; *Supervisors v. United States*, 4 Id. 444, referred to *supra*; but upon the principal case being remanded for further proceedings, the sureties, acting upon the suggestion of the court therein, filed a cross-bill seeking to impeach the judgment for usury in the bond, but without averring any tender or offer to pay the amount equitably due; and in *Bank of Wooster v. Stevens*, 6 Ohio St. 262, it was held that this averment was necessary. In *Kilbreth v. Bates*, 38 Id. 196, the principal case is cited as recognizing as authority the case of *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; S. C., 32 Am. Dec. 707, which holds that where a bank is limited in its charter to the taking of a certain rate per cent per annum on its loans and discounts, it has no capacity to loan at a higher rate, and if a loan at a higher rate be effected by discounting paper, no recovery can be had thereon; and this latter case and the principal case, with others, are cited in *Farmers' and Mechanics' Bank v. Parker*, 37 N. Y. 153, to the point that under the usury law of Ohio, in respect to a bank making an illegal loan, the contract is void, not because the statute so declares it, but simply because the contract is *ultra vires*. See also the principal case referred to in *Dow v. Updike*, 11 Neb. 98, in holding that a stipulation in a promissory note to pay a reasonable attorney's fee for instituting and prosecuting a suit on the note, in addition to legal interest, is unauthorized and void.

CHASE v. WASHBURN.

[1 OHIO STATE, 244.]

WAREHOUSEMAN'S IMPLIED OBLIGATION IN ORDINARY DEPOSIT is that he will use due diligence in the care of the property stored, and redeliver it to the owner or to his order on demand, upon being paid a reasonable compensation for his services; and if the warehouseman without the owner's consent mixes the property with other property, and ships the same for sale, he will be liable to the owner for the value of the property thus deposited.

PROPERTY REMAINS IN BAILOR IN CASE OF REGULAR DEPOSIT, and is held at the bailor's risk, unless it is appropriated by the bailee to his own use.

PROPERTY PASSES BY IRREGULAR DEPOSIT, OR MUTUUM, as fully as in ordinary sale or exchange, and the risk of loss by accident attaches to the control and dominion of the property; the depositary in such case being required to return another article of the same kind and value, or having an option to return the specific article or another of the same kind and value.

TRANSACTION IS SALE AND NOT BAILMENT, AND RISK OF LOSS BY ACCIDENT IS UPON WAREHOUSEMAN, where such warehouseman receives wheat, and with the depositor's consent or by custom mixes it with that of others, with the understanding that it is to be at the disposal of the warehouseman, and that when the depositor should present the receipts, the warehouseman would either pay the market price therefor or redeliver the wheat, or other wheat equal in amount and quality.

REFUSAL TO CHARGE UPON POINT IS NO GROUND FOR REVERSAL when no injury was thereby done to the party making the request.

ASSUMPSIT by Washburn, the plaintiff below, to recover the value of a quantity of wheat delivered by him to the defendants, Chase & Co., who carried on the business of warehousemen at Milan. The warehouse receipts offered in evidence were all similar in form to the following: "Milan, O., November 5, 1847. Received in store from J. C. Washburn (by son) the following articles, to wit: Thirty bushels of wheat. H. Chase & Co." Washburn's agent testified that he was instructed when he delivered the first load of wheat not to sell below a certain price, and if he could not obtain that price to store it with Chase & Co. Chase & Co. promised to pay the highest price when Washburn should call for it, and the wheat was accordingly delivered from time to time. Chase offered evidence to show that his warehouse, and in it sufficient wheat to answer the outstanding receipts, had been consumed by fire; and also that a custom existed at Milan to store all wheat received in a common mass, and to ship the same as occasion required, and on the presentation of the receipts to pay either the highest market price or deliver other wheat. The verdict and judgment were for the plaintiff, under the instructions of the court, and the charging and refusal to charge the jury were alleged for error. The questions involved sufficiently appear in the opinion.

Osborne and Taylor, for the plaintiff.

Worcester and Pennewell, for the defendant.

By Court, BARTLEY, J. To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between them, and the rights created and duties imposed thereby. It was either a contract of sale, a *mutuum*, or a deposit. If a contract of sale, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a *mutuum*, the absolute property passed to the mutuary, it being a delivery to

him for consumption or appropriation to his own use; he being bound to restore, not the same thing, but other things of the same kind. Thus it is held that if corn, wine, money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property, inasmuch as he received it for his own consumption or use, on condition that he restore the equivalent in kind. And in this class of cases the general rule is, *ejus est periculum, cujus est dominium*: Story on Bailments, sec. 283; Jones on Bailments, 64; *Coggs v. Bernard*, 2 Ld. Raym. 916. But if the transaction here was a deposit, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract in so doing. But if the bailee shipped the wheat and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property.

What, then, was the real character of the transaction between the parties? The receipt I suppose to be in the ordinary form of warehouse receipts, and such as would be proper to be delivered by a warehouse depositary of wheat to the owner, upon its being received into a warehouse for temporary safe keeping, and to be redelivered to the owner on demand. The obligation or contract which the law would imply as against the warehouseman on the face of such a receipt would be, that he should use due diligence in the care of the property, and that he should redeliver it to the owner or to his order, on demand, upon being paid a reasonable compensation for his services; and if the warehouseman, under such circumstances, should, without the consent of the owner, mix the wheat with other wheat belonging to himself or other persons, and ship the same to market for sale, he would be liable to the owner for the value of the wheat thus deposited with him.

The receipts themselves are silent as to the time the wheat was to be kept, the price to be paid for its custody, when or how to be paid, whose property it was to be after delivery into the warehouse, and what disposition was to be made of it. But it is claimed that, inasmuch as written receipts, whether for money or for other property, are always subject to explanation by parol, the terms on which this wheat was delivered can be explained by the declarations of the parties at the time of the delivery of the first load of wheat, and also by the custom of trade which prevailed among warehousemen at Milan; and that

by such explanation it is shown that the real transaction was, that the wheat was received, and with the consent of the depositor put in mass with other wheat of the warehouseman and that received of other persons, with the understanding that the wheat was to be at the disposal of the warehouseman, either to retain or ship it, and that when the receipts should be presented by the depositor, the warehouseman should either pay the market price therefor or redeliver the wheat, or deliver other wheat equal in amount and quality.

If these terms were incorporated into the contract they could not have excused the liability of the warehouseman in this case. The distinction between an irregular deposit, or a *mutuum*, and a sale is sometimes drawn with great nicety, but it is clearly marked, and has been settled by high authority. In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depositary is to return another article of the same kind and value, or has an option to return the specific article or another of the same kind and value, it is an irregular deposit, or *mutuum*, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says: "It may be proper to mention the distinction between an obligation to restore the specific things and a power or necessity of returning others of equal value. In the first case it is a regular bailment; in the second it becomes a debt." In the latter case he considers the whole property transferred.

Judge Story, in his commentaries on the law of bailment, says: "The distinction between the obligation to restore the specific things and the obligation to restore other things of the like kind and equal in value holds in cases of hiring as well as in cases of deposits and gratuitous loans. In the former cases it is a regular bailment; in the latter it becomes a debt or innominate contract. Thus, according to the famous laws of Alfenus, in the Digest, 'if an ingot of silver is delivered to a silversmith to make an urn, the whole property is transferred, and the employee is only a creditor of metal equally valuable, which the workman engages to pay in a certain shape, unless it is agreed that the specific silver, and none other, shall be wrought up in the urn:'" Story on Bailments, sec. 439.

In all this class of cases the risk of loss by unavoidable accident attaches to the person who takes the control or dominion over the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal, either to retain or to ship it on their own account, the property

passed, and the risk of loss by accident followed the dominion over it.

The doctrine here adopted was at one time somewhat obscured by the opinion of Chief Justice Spencer, in the case of *Seymours v. Brown*, 19 Johns. 44, in which the court decided that where the plaintiff delivered wheat to the defendants, on an agreement that for every five bushels of wheat the plaintiffs should deliver at the defendants' mill, they, the defendants, would deliver in exchange one barrel of flour, was a bailment, *locatio operis faciendi*; and the wheat having been consumed by fire, through accident, the defendants were not liable on their agreement to deliver the flour. This decision, however, was disapproved of by Chancellor Kent, as not being conformable to the true and settled doctrine laid down by Sir William Jones, who has been styled the great oracle of the law of bailment: 2 Kent's Com. 464. And the decision has been distinctly overruled by repeated subsequent adjudications in the state of New York: *Hurd v. West*, 7 Cow. 752; *Smith v. Clark*, 21 Wend. 83. [34 Am. Dec. 213]; *Norton v. Woodruff*, 2 N. Y. 153; *Mallory v. Willis*, 4 Id. 77; *Pierce v. Schenck*, 3 Hill (N. Y.), 28.

The same doctrine has been affirmed in the case of *Barker v. Roberts*, 8 Greenl. 101, and also *Ewing v. French*, 1 Blackf. 354. In the latter case, a quantity of wheat having been delivered by the plaintiff to the defendants at their mill, to be exchanged for flour, and the defendants having put the wheat into their common stock of wheat, the mill with the wheat was afterwards casually destroyed by fire. The court held that the defendants were liable for a refusal to deliver the flour. If in that case the agreement of the parties had been that the flour to be furnished should be the flour which should be manufactured from the specific wheat delivered, instead of an exchange of wheat for flour, it would have been a bailment, and the loss would have fallen upon the plaintiff.

In the case of *Buffum v. Merry*, 3 Mason, 478, where the plaintiff had delivered to the defendant cotton yarn on a contract to manufacture the same into cotton plaids, and the defendant was to find filling, and to weave so many yards of plaids, at eighteen cents per yard, as was equal to the value of the yarn at sixty-five cents per pound, it was held to be a sale of the yarn; and that, by the delivery of it to the defendant, it became his property, and he was responsible for the delivery of the plaid, notwithstanding the loss of the yarn by an accidental fire. But had the plaintiff and the defendant agreed to have the par-

ticular yarn, with filling to be found by the defendant, made into plaids on joint account, and the plaids, when woven, were to be divided according to their respective interests in the value of the materials, but before the division the plaids had been destroyed by accident, the loss, in the opinion of Judge Story, would have been mutual, each losing the materials furnished by himself. The case of *Slaughter v. Green*, 1 Rand. 3 [10 Am. Dec. 488], and also the case of *Inglebright v. Hammond*, 19 Ohio, 337 [53 Am. Dec. 430], are relied upon as sustaining the plaintiffs in error. These two cases, on examination, do not sustain the doctrine of the case of *Seymours v. Brown*, 19 Johns. 44. On the contrary, instead of an exchange of wheat for flour, in each of the cases, by the express terms of the contract, the flour to be returned was to be manufactured out of the wheat furnished. In the former case, the written receipts given for the wheat expressly provided "that it is received to be ground," which excludes the idea of passing the ownership to the miller. And in the latter case, it was also expressly provided by the agreement that the flour in controversy was "to be made out of the wheat furnished by Hammond," and "the flour made therefrom was to be delivered at Steubenville for said Hammond's use."

In both these cases, therefore, the limitation in the agreement of the parties imported a bailment, and not an exchange for flour. And this character of the transaction is not lost either because the custom of the country in reference to which the wheat was received warranted the mixing of it with the wheat of others received on like terms; or because, by the express consent of the parties, the wheat was mixed with other wheat in the mill belonging to the miller himself. When the owners of the wheat consent to have their wheat, when delivered at a mill or warehouse, mixed with a common mass, each becomes the owner in common with others of his respective share in the common stock. And this would not give the bailee any control over the property which he would not have if the wheat of each one was kept separate and apart. If the wheat thus thrown into a common mass be delivered for the purpose of being converted into flour, each owner will be entitled to the flour manufactured from his proper quantity or proportion in the common stock. If a part of the wheat held in common belong to the bailee himself, he could not abstract from the common stock any more than his own appropriate share without a violation of the terms of the bailment; and such a breach of his en-

gagement could not be cured by his procuring other wheat to be delivered to supply the place of that thus wrongfully taken. But if the wheat be thrown into the common heap, with the understanding or agreement that the person receiving it may take from it at pleasure, and appropriate the same to the use of himself or others, on the condition of his procuring other wheat to supply its place, the dominion over the property passes to the depositary, and the transaction is a sale, and not a bailment.

It is claimed that the court of common pleas erred in refusing to charge the jury as requested, "that the custom among warehousemen at Milan, in the absence of an express contract, if known to Washburn, became a part of the contract."

A custom, it is true, is not admissible either to contradict or alter the terms or legal import of a contract, or to change the title to property by varying a general rule of law. But a custom, when fully established, becomes the law of the trade in reference to which it exists; and the presumption is that the parties intended to conform to it when they have been silent on the subject. Its office is to interpret the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contract, arising not from express stipulations, but from mere implications and presumptions, and of acts of doubtful and equivocal character. I am not prepared to say that the customs at Milan, if fully established and known to both the parties to a contract for the delivery of wheat to a warehouseman, may not be regarded as law, as well as the customs of London or of Kent. But, unfortunately for the plaintiffs in error, the customs of Milan, as the evidence tended to prove, according to the bill of exceptions, very clearly showed the transaction between the parties in this case to be a contract of sale, and not a bailment. Had the court, therefore, charged as requested upon this point, it could not have aided the defense set up against the action. So that if the court did err in this particular, no injury was therefore done to the plaintiffs in error.

Judgment affirmed.

WAREHOUSEMAN'S LIABILITIES IN GENERAL: See *Schmidt v. Blood*, 24 Am. Dec. 143, and note discussing the question; and see *Cox v. O'Riley*, 58 Id. 663.

BAILEE'S LIABILITY FOR MISUSER: See *De Tollenere v. Fuller*, 12 Am. Dec. 316, and note.

MIXTURE OF GOODS AS AFFECTING TITLE: See the notes to *Pulcifer v. Page*, 54 Am. Dec. 590; *Schmidt v. Blood*, 24 Id. 157. Where goods are mixed so as to lose their identity, the owner parts with his property, as he

parts with the means of identifying and controlling it; and the person to whom they are delivered, instead of being a bailee, becomes a debtor: *Bailey v. Bensley*, 87 Ill. 561, referring to the principal case on this point.

TRANSACTION WHEN SALE AND WHEN BAILMENT.—Where wheat is delivered to a miller, and flour is to be returned instead thereof: See *Slaughter v. Green*, 10 Am. Dec. 488; *Smith v. Clark*, 34 Id. 213, and notes to these cases; *Inglebright v. Hammond*, 53 Id. 430; *Foster v. Pettibone*, 57 Id. 530. Where hides are delivered to a tanner to be tanned: See *Jenkins v. Eichelberger*, 28 Id. 691. The right of property follows the dominion over it; and in all cases of a *mutuum* or deposit, where the mutuary or depositary has the option to return either the same identical article or the same amount in kind, the right of property passes, and the mutuary or depositary is indebted to the lender or depositor for the amount: *Exchange Bank v. Hines*, 3 Ohio St. 27; *Lonergan v. Stewart*, 55 Ill. 49; *Richards v. Olmstead*, 74 Id. 216; but if the identical thing delivered is to be restored, though in an altered form, the contract is one of bailment, and the title is not changed: *Lonergan v. Stewart* and *Richards v. Olmstead*, *supra*. Where, therefore, grain is delivered to a warehouseman, who mixes it with that of others, under an express contract or a contract implied from the usual course of business that when the depositor chooses to call for it the warehouseman will pay the highest market price or return the same amount of grain of like quality, the transaction is a sale, and not a bailment: *Rahilly v. Wilson*, 3 Dill. 426; *Lonergan v. Stewart* and *Richards v. Olmstead*, *supra*; and see *Bailey v. Bensley*, 87 Ill. 561. The principal case is cited to the foregoing points. But in *Sexton v. Graham*, 53 Iowa, 188, 189, it is held that where grain is delivered to a warehouseman, and a receipt taken, providing that it might be stored in a common mass with other grain of the same quality, the contract was one of bailment and not of sale, although the warehouseman was himself continually buying and adding grain on his own account to the common mass, and shipping away therefrom; distinguishing the principal case and others, on the ground that in them there was enough in the receipts or in the circumstances, or both, to evince an understanding upon the part of the depositor that the warehouseman should have a right to sell the thing deposited upon his own account, or otherwise appropriate it to his own use.

USAGE AS CONTROLLING CONTRACTS: See *Beirne v. Dord*, 55 Am. Dec. 321, and cases in the note thereto; *Cox v. O'Riley*, 58 Id. 633. The principal case is cited in *Protection Ins. Co. v. Harmer*, 2 Ohio St. 455, to the point that a party has a right to have a contract interpreted and enforced by the general principles of law, unaffected by any local custom, unless it appears that such custom was understood by the parties, and the contract made in reference to it.

JUDGMENT NOT REVERSED FOR ERROR NOT PREJUDICIAL: See *Dikeman v. Parrish*, 47 Am. Dec. 455; *Zachary v. Pace*, Id. 744; *Worrall v. Parmelee*, 49 Id. 350; *Johnson v. Evans*, 50 Id. 669, and notes to these cases; *Noyes v. Shepherd*, Id. 625; *Shorter v. People*, 51 Id. 286, and note; *Kohn v. Schooner Renaissance*, 52 Id. 577; *McPherson v. McPherson*, 53 Id. 416; *Edgerly v. Emerson*, 55 Id. 207; *Balliet v. Commonwealth*, Id. 581; *Hensley's Adm'rs v. Lytle*, Id. 741; *Kilburn v. Ritchie*, 56 Id. 326; *Walters v. Jordan*, 57 Id. 558.

RUSSELL v. FAILOR.

[1 OHIO STATE, 327.]

NOTE TAKEN BY BANK IS VOID FOR USURY when more than the rate per cent allowed by its charter is taken or reserved.

ACTION AT LAW FOR CONTRIBUTION FROM CO-SURETY CAN ONLY BE SUSTAINED where a just and equitable ground exists therefor, since the right is founded, not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits, and the common law has adopted and given effect to this equitable principle.

CONTRACT OF SURETYSHIP IS ACCESSORY TO OBLIGATION CONTRACTED BY ANOTHER, and it is of the essence of the contract that there be a subsisting valid obligation of a principal debtor.

CONTRIBUTION AGAINST CO-SURETY CAN NOT BE CLAIMED by a surety who voluntarily pays money on a void note.

ASSUMPSIT for contribution for money paid by the plaintiff as co-surety with the defendant. Judgment was given for the defendant by the court, a jury having been waived, and to reverse which this writ of error is brought by the plaintiff. It appears from the bill of exceptions that the plaintiff and the defendant were co-sureties on a promissory note payable to and discounted by the Preble County Branch, in Eaton, of the State Bank of Ohio, at the Ohio Life Insurance and Trust Company, Cincinnati. The principal on this note had failed, and the plaintiff had executed to the bank a mortgage as security, and finally paid an amount in full for the note and satisfied the mortgage. When the note was discounted, the bank reserved in advance interest at the rate of six per cent per annum, and also three fourths of one per cent on the amount of the note, on the alleged ground of a charge for exchange, and the trouble and expense of collecting and remitting the funds from Cincinnati to Eaton. The rate of exchange between Cincinnati and Eaton was at the time in favor of the latter place. The plaintiff had notice of the reservation of the three fourths of one per cent before payment of the note, but there was no direct proof that he knew of this fact at the time he executed the mortgage.

G. J. and J. M. Smith, for the plaintiff.

Ward, for the defendant.

By Court, BARTLEY, C. J. The errors assigned in this case are substantially the following: 1. That the court erred in holding that the note was void, and that the payment of the same by the plaintiff gave him no right of action against the defendant

for contribution; 2. That the court erred in overruling the motion for a new trial, etc.

Two questions are here presented for determination: 1. Was the note void on the ground of usury? 2. Can a surety on a promissory note which is absolutely void, by the voluntary payment thereof, entitle himself to contribution against the co-surety?

The first question has been determined in the affirmative by adjudications already made in this state: See the case of *Preble Branch Bank v. Russell*, 1 Ohio St. 313; also *Bank of Chillicothe v. Swayne*, 8 Ohio, 257 [32 Am. Dec. 707]; *Creed v. Commercial Bank of Cincinnati*, 11 Id. 489; *Miami Exporting Co. v. Clark*, 13 Id. 1; *Commercial Bank v. Reed*, 11 Id. 498; *United States Bank v. Owens*, 2 Pet. 538.

The second question is one which does not appear to have been very frequently presented for adjudication.

The right of contribution among sureties is founded not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits. The common law has adopted and given effect to this equitable principle, on which a surety is entitled to contribution from his co-surety. This equitable obligation to contribute having been established, the law raises an implied *assumpsit* on the part of the co-surety to pay his share of the loss resulting from a concurrent liability to pay a common debt. This jurisdiction, by an action at law, is, therefore, resorted to when the case is not complicated; and the more extensive and efficient aid of a court of equity is thus rendered unnecessary. It follows that this action can only be sustained where there exists a just and equitable ground for contribution.

A contract of suretyship is accessory to an obligation contracted by another person, either contemporaneously, or previously, or subsequently. It is of the essence of the contract that there be a subsisting valid obligation of a principal debtor. Without a principal there can be no accessory; and by the extinction of the former the latter becomes extinct. This results from the nature of the obligation of suretyship: *Burge on Suretyship*, 3, 6; *Theobald on Principal and Surety*, 2.

It would seem to follow, from the very nature of the undertaking, that if the principal contract is absolutely void, the obligation of the surety would likewise be void. But it is said that where the contract of the principal debtor is only voidable on account of incapacity or otherwise, and the person under-

taking as surety contracted with a knowledge of the incapacity or other cause making the principal obligation voidable, he must be understood as incurring, not merely a collateral, but a principal obligation. How far this may extend, as between surety and principal, it is not necessary here to inquire; but there seems to be sound reason in the doctrine that where the surety has knowledge of that which amounts to a valid defense for him against the creditor, he is bound either to avail himself of it or to give notice to the principal debtor, so as to enable him to set up the defense; and in default of doing either, he would be deprived of recourse against the principal: Burge on Suretyship, 367.

The utmost extent to which a surety who has made payment can claim is a subrogation to the rights of the creditor, so that he will rank against the debtor in the same degree as the creditor would have done if he had not been paid. Where, therefore, a surety could have no remedy against the principal, he clearly could have none against his co-surety, against whom he would have less equity in his favor.

Such, then, being the nature of the contract of suretyship, to what right of contribution was the plaintiff entitled in this case against the defendant? The claim set up by the plaintiff bank was absolutely void; and it could have acquired no validity from the execution of the mortgage by the plaintiff before he had notice of the usury, especially as against the defendant. And it appears that the plaintiff had knowledge of the usury before he paid the debt. With what pretense of equity can the plaintiff, who was not bound himself, by voluntarily paying a void note, claim to impose an obligation upon the defendant as his co-surety, who was under no obligation before, either legal or equitable? Had the creditor instituted a suit on the note against the defendant, his remedy was clear and complete; and he could not certainly have been deprived of his means of defense by the voluntary act of the plaintiff. This is clearly not a case where an implied *assumpsit* could have been raised against a co-surety for contribution.

The principle laid down in the case of *Skillin v. Merrill*, 16 Mass. 40, would seem to be in point in this case, and fatal to the plaintiff's cause of action. And it is not shaken by the case of *Ford v. Keith*, 1 Mass. 139 [2 Am. Dec. 4], and the case decided upon its authority, of *Wallace v. Burns*, 6 Ala. 780, to which reference has been made. The two last cases are not strictly analogous to the present one. Upon no principle of

justice or sound reason can a surety, by voluntarily paying money on a void note, impose an obligation upon a co-surety for contribution.

Judgment affirmed.

WHAT TRANSACTIONS ARE USURIOUS: See *Davis v. Garr*, 55 Am. Dec. 387, and note. The principal case is cited in *Kilbreth v. Bates*, 38 Ohio St. 196, as recognizing as authority the case of *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; S. C., 32 Am. Dec. 707, which holds that a bank limited in its charter to the taking of a certain rate per cent per annum on its loans and discounts has no capacity to loan at a higher rate, and if such a loan be effected by discounting paper, no recovery can be had thereon.

CONTRIBUTION AMONG CO-SURETIES IS NOT FOUNDED UPON CONTRACT, but upon the principle that equality is equity: *Moore v. Moore*, 15 Am. Dec. 523; *White v. Banks*, 56 Id. 283. The principal case is cited to this proposition in *Camp v. Bostwick*, 20 Ohio St. 347.

SUBSISTING VALID OBLIGATION OF PRINCIPAL DEBTOR IS OF ESSENCE OF CONTRACT OF SURETYSHIP. Without a principal there can be no accessory, and by the extinction of the former the liability of the latter becomes extinct: *State v. Blake*, 2 Ohio St. 150, quoting the principal case with approval.

TEAFF v. HEWITT.

[1 OHIO STATE, 511.]

FINAL DECREE IS ONE WHICH DETERMINES AND DISPOSES OF WHOLE MERITS OF CAUSE before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination.

INTERLOCUTORY DECREE IS ONE WHICH LEAVES FOR FUTURE DETERMINATION EQUITY OF CASE, or some material question connected with it.

APPEAL FROM FINAL DECREE OPENS UP WHOLE MERITS OF CAUSE touching the subject-matter of the decree.

FIXTURE IS ARTICLE WHICH WAS CHATTEL, but which, by being physically annexed or affixed to the realty, became accessory to it, and part and parcel of it.

CRITERION OF FIXTURE IS UNITED APPLICATION OF REQUISITES: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Appropriation to the use or purpose of that part of the realty with which it is connected; 3. Intention of the party making the annexation to make the article a permanent accession to the freehold; but this criterion is subject to the qualification that the rights of the parties are liable to be controlled by an established custom or special agreement of the parties.

EXTENT AND MODE OF ANNEXATION OF ARTICLE TO FREEHOLD DEPEND much upon the nature of the article itself, the use to which it is applied, and other attending circumstances.

INTENTION TO MAKE ARTICLE PERMANENT ACCESSION TO REALTY MUST AFFIRMATIVELY AND PLAINLY APPEAR to change the nature and legal qualities of a chattel into those of a fixture; and if it be a matter left in

doubt and uncertainty, the legal qualities of the article are not changed, and it must be deemed a chattel.

REAL ESTATE, WITH PERSONAL PROPERTY RETAINING ALL ESSENTIAL QUALITIES OF CHATTELS, MAY BE UNITED by a manufacturing establishment in the same pursuit and for producing the same result, without either being made accessory to the other.

MACHINERY IN FACTORY IS NOT FIXTURE, where it is connected with the motive power by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use, and is subject to removal, as the interests of business or convenience may require, without injury to the machinery itself or the building.

MACHINERY NOT AFFIXED TO FREEHOLD IS NOT COVERED BY MORTGAGE which describes the mortgaged premises as a certain lot "on which is erected a woolen manufactory."

CRITERION OF FIXTURE IN MANUFACTORY OR MILL IS NOT DIFFERENT from that which applies to articles attached to the realty under other circumstances.

DEFENDANTS ARE NOT ENTITLED TO DECREE FOR AMOUNT OF THEIR JUDGMENTS AND PENALTY, under section 4 of the Ohio act of 1845, where an injunction against selling property on execution is dissolved as to part only, and the property released has not diminished in value in consequence of the injunction, but has been sold on execution after the dissolution of the injunction, and the proceeds applied on the judgments.

BILL in chancery, filed in October, 1849, in the court of common pleas of Jefferson county, by James Teaff against Samuel Hewitt, and certain judgment creditors of the latter. for the appraisement and sale of premises mortgaged to the complainant by Hewitt, and to enjoin the creditors from detaching certain alleged portions of the mortgaged premises and selling the same as chattels on execution. The mortgaged premises were described in the mortgage as "lot No. 322 in Veirs' addition to the town of Steubenville, on which is erected a woolen manufactory." The property, the sale of which was sought to be restrained, was in this factory, and consisted of a steam-engine and boilers, carding machines, spinning-jacks, power-looms, etc., annexed to the realty, and used in the manner stated in the opinion. At the November term, 1849, certain of the defendants, including Hewitt, answered, denying that any title or interest in the machinery levied on was acquired under the mortgage, and alleging that at the time the mortgage was executed a chattel mortgage on the machinery, which had expired, was taken by Teaff. A motion was also made to dissolve the injunction, which was granted as to everything but the steam-engine and boilers; and after the dissolution, the property on which the injunction had been dissolved was sold on execution by the defendants, Hewitt's judgment

creditors. At the May term, 1850, Teaff took his decree for the amount due him, with interest and costs, and in default of payment the sale of the lot and the engine and boilers was ordered. The court at the same term also extended the dissolution of the injunction to all the defendants who had answered the bill subsequent to the preceding term, and referred the cause to a master to report on the value of the property as to which the injunction had been dissolved. At the August term, 1850, the master made his report, and a decree was entered against the complainant for the balance on the defendants' judgments enjoined, with the penalty of five per cent and costs, from which decree the complainant appealed.

Roswell Marsh, for the complainant.

Stanton and McCook, for the judgment creditors of Hewitt.

R. S. Moody, for the respondents.

By Court, BARTLEY, C. J. The questions presented by this case for determination are as follows:

1. Does the appeal from the decree of the August term, 1850, open up the merits of the case touching the property as to which the injunction had been dissolved?

2. Was the property relative to which the injunction was dissolved parcel of the realty, or was it chattel property?

3. If the latter, and the property had not diminished in value in consequence of the injunction, but had been, after the dissolution of the injunction, sold on execution, and the proceeds applied on the judgments, were the defendants entitled to any decree against the complainant for the amount of their judgments and the penalty.

Of these in their order.

1. An appeal from a decree is nothing else than a proceeding in the original cause which continues the case by vacating or suspending the decree till the final hearing in the appellate court. The fifty-fifth section of the law of March 10, 1831, directing the mode of proceeding in chancery, 29 Ohio Laws, 81, authorized an appeal to the supreme court, from any final sentence or decree in chancery, in the court of common pleas, on the terms prescribed. A final decree is one which determines and disposes of the whole merits of the cause before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination, so that it will not be necessary to bring the cause or that separate branch of the cause again before the court for

further decision. It is true that after final decree defining and settling the rights of the parties, further orders or decrees may be necessary to carry into effect the rights settled by the final decree on the merits; such as a decree confirming a sale, or confirming the proceedings or report of a master, carrying into effect the terms of the final decree. This, however, is a subsequent proceeding, and only auxiliary to or in execution of the final decree on the merits of the case. And an appeal from a decree in this subsequent proceeding brings nothing before the court except the proceedings which follow the final determination of the merits: *Hey v. Schooley*, 7 Ohio, pt. 2, 48; *Himely v. Rose*, 5 Cranch, 313; *The Santa Maria*, 10 Wheat. 442. An interlocutory decree is one which leaves the equity of the case, or some material question connected with it, for future determination. Where the further action of the court is necessary to give the complete relief contemplated by the court upon the merits, the decree under which the further question arises is to be regarded not as final, but as interlocutory: *Cocke v. Gilpin*, 1 Rob. (Va.) 20.

The case before us presents a double aspect for the subject-matter of a decree. The object of the bill was to sell the mortgaged premises and apply the proceeds of the sale to the payment of Hewitt's indebtedness to complainant, and also to enjoin the proceedings under the judgments of the other creditors of Hewitt and prevent the sale of the machinery in the manufactory, which the complainant claimed to be a part of the realty and to be covered by his mortgage. After the dissolution of the injunction, the respondents, who were judgment creditors of Hewitt, sold the property as to which the injunction was dissolved on execution. At the May term of the common pleas, 1850, Teaff, the complainant, took his decree upon one branch of the case against Hewitt, for the amount of his debt, with interest and cost of suit, and in default of the payment of the same, for the appraisement and sale of the mortgaged premises, including the steam-engine and boilers, as to which the injunction had not been dissolved. The decree upon this branch of the case, at that term, was complete and final; no further action of the court was requisite. The defendants did not appeal from this decree, but acquiesced in it; and this part of the case is not now in controversy, as it appears, between the parties.

But as to the other branch of the case, the court at that term extended the dissolution of the injunction to the defendants who had answered the bill subsequent to the preceding term, and referred the cause to a master to take testimony and report under

special instructions at the next term touching the value of the machinery as to which the injunction was dissolved, at the time the injunction was granted; what it would have sold for on execution had no injunction been granted; whether the same had been sold by the sheriff on execution after the dissolution of the injunction; and if so, upon whose executions, to whom sold, and for what amount; the amount of the judgments enjoined, their priority as to liens, the amount yet due thereon, and the transfers of said judgments, if any, since their rendition, and to whom made, etc. The main question touching the rights of the parties involved in this branch of the case was left for the future action of the court on the coming in of the report of the master.

The decision that the steam-engine and boilers, as to which the injunction had not been dissolved, were fixtures and covered by the mortgage, and the order for their sale as a part of the mortgaged premises did not determine the rights of the parties in the property as to which the injunction had been dissolved. That property had been detached and sold on execution prior to this decree, and was not, therefore, in a situation to be appraised and sold under the mortgage, if even it had belonged to the realty. And whether the complainant was in equity entitled to a decree against the defendants who had caused the property to be sold on execution, or if properly so sold, what decree, if any, the defendants were entitled to against the complainant, was left for future determination. And at the August term, 1850, the court determined this branch of the case, by finding that the defendants had not abandoned their levies, and by rendering a decree against the complainant for the balance on the defendants' judgments with interest, and the penalty of five per cent besides the costs of the suit. From this decree the complainant might well appeal, and the appeal opens up the whole merits touching this branch of the case, at least between him and the judgment creditors.

- 2. Was the property in controversy covered by the mortgage on the realty, or was it chattel property? This is the main question in the case, and one of great importance.

The bill and answers, which are under oath, furnish the only testimony to be found in the case as to the nature and description of the property, the mode of its annexation, and the purpose for which it was annexed to the realty, all of which appear in the statement of the case. It appears that the boilers were bolted upon timbers which were planted in the earth, with a brick furnace built under them and adapted to their use, but

they rested upon the timbers to which they were bolted and by which they were supported, rather than upon the brick-work. The steam-engine was fastened upon timbers which rested for their foundation on a stone-wall laid in the earth. The other machinery, consisting of carding machines, spinning machines, power-looms, etc., was connected with the motive power of the steam-engine by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use. It appears from the answers that such machinery as carding machines and spinning machines and power-looms, etc., is generally fastened to the floor by cleats or other similar modes of attachment, for the purpose of keeping the various parts steady and in a suitable position for use; but they are easily detached, as were these, without injury to the machinery itself or the building; and that such machinery is usually subject to be removed from one part of the building to another to suit convenience, and sometimes sold and other machinery supplied to take its place, whenever the interest of the business for which it is used may require.

The doctrine of fixtures, by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions made at different periods of time and under a variety of circumstances, and running into numerous, complex, and conflicting distinctions arising out of the peculiar relation of the parties and the peculiar circumstances of each particular case; so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

According to the decisions, an article may be a fixture constituting a part of the realty as between vendor and vendee, which would not under like circumstances be such as between landlord and tenant; so also an article may be such fixture as between heir and executor, which under like circumstances of annexation would not be such as between tenant for life and the remainderman or reversioner. And also according to the decisions, an article affixed to the premises for purposes merely agricultural may pass by a conveyance of the freehold as a fixture, which would not be such fixture under like annexation if erected or affixed for the purpose of trade or manufacture; and an article attached to the realty may be removable at one period of time as a chattel, which with the same annexation at another period

would not be removable, because it constituted a part of the realty. In some cases it has been determined that in order to constitute a fixture the article should be so united by physical annexation to the land or to some substance previously belonging thereto that it can not be detached without injury to the property; while in other cases articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold, with but a slight attachment to the realty, and in some instances without any actual, but by simply a constructive, attachment.

The term "fixture" itself, although always applied to articles of the nature of personal property which have been affixed to land, has been used with different significations until it has become a term of ambiguous meaning. And this ambiguity which has attended the use of this word in various adjudications, and by different writers, has been productive of much of the uncertainty which has perplexed investigations falling under this branch of the law. The term "fixture" has been used by various writers and in numerous reported decisions as denoting personal chattels annexed to land which may be severed and removed against the will of the owner of the freehold, by the party who has annexed them, or his personal representatives: *Amos & Ferard on Fixtures*, 2; *Gibbon on Fixtures*, 2; *Grady on Fixtures*, 1; 2 *Bouv. Inst.* 162; 2 *Kent's Com.* 344.

There may be some propriety in this definition of the term when confined in its application to the relation of landlord and tenant, or tenant for life or years and remainderman or reversioner, to which several of the elementary authors have chiefly confined their attention. But it does not appear to express the accurate meaning of the term in its general application. An article attached to the realty, but which is removable against the will of the owner of the land, has not lost the nature and incidents of chattel property. It is still movable property, passes to the executor and not to the heir on the death of the owner, and may be taken on execution and sold as other chattels, etc. A removable fixture, as a term of general application, is a solecism—a contradiction in words. There does not appear to be any necessity or propriety in classifying movable articles, which may be for temporary purposes somewhat attached to the land, under any general denomination distinguishing them from other chattel property. A tree growing upon the soil, or any other article belonging to the freehold, may be converted into a chattel by a severance from the land.

It is an ancient maxim of the law, that whatever becomes fixed to the realty thereby becomes accessory to the freehold, and partakes of all its legal incidents and properties, and can not be severed and removed without the consent of the owner. *Quidquid plantatur solo, solo cedit*, is the language of antiquity in which the maxim has been expressed. The term "fixture" in its ordinary signification is expressive of the act of annexation, and denotes the change which has occurred in the nature and the legal incidents of the property; and it appears to be not only appropriate but necessary to distinguish this class of property from movable property possessing the nature and incidents of chattels. It is in this sense that the term is used in far the greater part of the adjudicated cases: Co. Lit. 53 a; 2 Smith's Lead. Cas. 114; Chancellor Kent's note a, 2 Kent's Com. 345; *Dudley v. Warde*, 1 Amb. 113; *Elwes v. Maw*, 3 East, 57. It is said that this rule has been greatly relaxed by exceptions to it established in favor of trade, and also in favor of the tenant, as between landlord and tenant. And the attempt to establish the whole doctrine of fixtures upon these exceptions to the general rule has occasioned much confusion and misunderstanding on this subject.

Amos and Ferard, in their treatise on the law of fixtures, mention the division of the subject into removable and irremovable fixtures, and give a definition of each class: See Amos & Ferard on Fixtures, 11. And they remark "that it is difficult to determine in which of the above senses it is most frequently employed." This classification of fixtures may be essential to a correct understanding of the double sense in which the term has been frequently used in the authorities; but it would not seem to be needed for any other purpose.

The civil law has been commended for its simple and natural classification of property into the obvious and universal distinction of things movable and things immovable, things tangible and things intangible. Whatever would be movable property by the civil law would fall under the denomination of chattels personal by the common law. And everything attached to the freehold *perpetui usus causa* belonged to the *res immobiles* of the civil law: Taylor's Elements of the Civil Law, 475. This simple division of property seems to be founded in reason and the nature of things.

The great difficulty which has always perplexed investigation upon this subject has been the want of some certain, settled, and unvarying standard by which it could be determined what

amounts to a fixture, or what connection with the land will deprive a chattel of its peculiar legal qualities as such, and make it accessory to the freehold. Fixtures belong to that class of property which stands upon the boundary line between the two grand divisions of things real and things personal into which the law has classified property—a distinction not merely artificial, but founded on reason and the nature of things; regarding not only the natural qualities of immobility on the one hand and mobility on the other, but also the legal constitution and incidents to which each class respectively is subject. In the great order of nature, when we compare a thing at the extremity of one class with a thing at the extremity of another, the difference is glaring; but when we approach the connecting link between the two great divisions, it is often difficult to discover the precise point where the dividing line is drawn.

There are some matters having their foundation in things real which are, nevertheless, by the principles of the common law, attended with some of the qualities of things personal, and therefore termed chattels real. Such are estates less than freehold, easements, rents, emblements, etc. These, however, are easily identified, and have no connection with fixtures. And again, there are others which, though movable in their nature, and apparently falling within the definition of things personal, are, in respect of their legal qualities, of the nature of things real. Belonging to this class are heirlooms and things in the nature of heirlooms, which by special custom pass with the inheritance; also animals, *feræ naturæ*, not domesticated, so as to fall under the denomination of chattels, yet so confined to the realty as to become appurtenant to it; such as deer in a park, pigeons in a pigeon-house, conies in a warren, fish in a pond, etc.; also articles sometimes called fixtures, on the principle of constructive attachment; such as the deeds and other papers which constitute the muniments of title to the land, the keys of a house, etc., which belong to the realty and pass with it, not upon the principle of fixtures, but upon the principle of being necessary and essential incidents to it, and of no value abstracted from it. None of these articles acquire their legal qualities upon the principle of a fixture.

A fixture is an article which was a chattel, but which by being physically annexed or affixed to the realty became accessory to it and part and parcel of it. But the precise point in the connection with the realty where the article loses the legal qualities of a chattel and acquires those of the realty often presents a

question of great nicety and sometimes difficult determination. And a review of the authorities, from the time of the Year-books down to the present period, does not furnish any one established and certain criterion of universal application by which this line of demarkation can be clearly ascertained and pointed out. It may, however, be useful, in the determination of this case, to examine the authorities and endeavor to extract from them the most uniform, reasonable, and consistent principle, as a standard by which a fixture can always be determined. —

If there be anything well settled in the doctrine of fixtures, it is this: that to constitute a fixture it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this: *Walker v. Sherman*, 20 Wend. 636. But the mode or degree of the annexation which is essential is a matter about which the authorities are greatly in conflict. Amos and Ferard, in their work above referred to, page 2, lay down the rule as follows: "It is necessary in order to constitute a fixture that the article should be let into or united to the land, or to substances previously connected therewith." The manual of Gibbon and the work of Grady on fixtures are to the same effect, and numerous adjudicated cases are referred to by these elementary writers establishing the same doctrine. A number of the authorities, both English and American, decide that to give chattels the character of fixtures, and deprive them of that of personalty, they must be so firmly affixed to the real estate that they can not be removed without injury to the freehold by the act of removal and apart from the abstraction of the thing removed: *Farrar v. Chauffetete*, 5 Denio, 527.

This doctrine, however, does not furnish a criterion of uniform application, or one which will bear the test of examination. Mill-stones in a mill, and even the water-wheel, and a great variety of other articles well established by authority and universally admitted to be fixtures, may often be removed without any actual injury to the structure or building by the act of removal. Fences, which are undeniably fixtures, and so admitted by all the authorities referring to them, although actually annexed to and in connection with the land, are yet not let into the ground or fastened to anything which is imbedded into the earth. The doors, windows, window-shutters, etc., of a mansion-house may be raised and removed without any actual or physical injury either to the building or the article removed; so, also, in a mill, with the mill-stones, hoppers, and bolting apparatus, as usually

fixed in a mill; yet it has never been questioned that these articles are fixtures.

There is another class of authorities in which it is laid down that the true test of a fixture is the adaptation of the article to the use or purpose to which the realty is appropriated, however slight its physical connection with it: *Farrar v. Stackpole*, 6 Greenl. 157 [19 Am. Dec. 201]; *Gray v. Holdship*, 17 Serg. & R. 413 [17 Am. Dec. 680]. And some cases have gone so far as to make this the only test, and even dispense with actual or physical annexation; *Voorhis v. Freeman*, 2 Watts & S. 116 [37 Am. Dec. 490]; *Pyle v. Pennock*, Id. 391 [37 Am. Dec. 517].

This rule is in conflict with those authorities which make the mode of the physical annexation the test, and it will not bear examination as a criterion of general application. If adaptation and necessity for the use and enjoyment of the realty be the sole test of a fixture, then the implements and domestic animals necessary for the cultivation of a farm, and a great variety of other articles subject to the use of the land or its appurtenances, which never have been and never can be recognized as such, would be fixtures. It would utterly confound the rule by which the rights of the vendor and vendee, heir and executor, etc., have been heretofore governed.

In the case of the *Despatch Line v. Bellamy Man. Co.*, 12 N. H. 205 [37 Am. Dec. 203], the court expressed the opinion that actual annexation to the freehold and adaptation to its purpose must both unite in order to render personal property incident and appurtenant to real estate.

In some of the authorities the intention of the party making the annexation is laid down as the true test of a fixture: *Winslow v. Merchants' Ins. Co.*, 4 Met. 306 [38 Am. Dec. 368].

Mr. Dane, in his Abridgment of American Law, remarks: "It is very difficult to extract from all the cases as to fixtures in the books any one principle on which they have been decided, though being fixed or fastened to the soil, house, or freehold seems to have been the leading one in some cases, yet not the only one:" 3 Dane's Abr. 156. And he adds, in reference to this matter: "Not the mere fixing or fastening is alone to be regarded, but the use, nature, and intention."

From the examination which I have been enabled to give to this subject, and after a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1. Actual annexation to the realty, or something appurtenant

thereto; 2. Appropriation to the use or purpose of that part of the realty with which it is connected; 3. The intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

This criterion furnishes a test of general and uniform application; one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases; but it is believed to be at variance with the conclusion in but few of the well-considered adjudications.

Adopting this as the criterion, there will be found no occasion for giving an ambiguous meaning to the term "fixture;" no occasion for denominating an article a fixture at one period of time which with the same annexation would not be such at another period; no occasion for determining that to be a fixture as between vendor and vendee which under like circumstances would not be such as between landlord and tenant; or finding that to be a fixture as between heir and executor which under like circumstances of annexation would not be such as between tenant for life and remainderman or reversioner: *Sturges v. Warren*, 11 Vt. 433. It is true, the time of the annexation and the relation and situation of the parties may constitute very important considerations in ascertaining the intention and object of making the annexation. Why is a tenant for life, or for years, or at will, favored with the right of removing articles which he attaches to the land during his term? The supreme court of Massachusetts say, in *Whiting v. Brastow*, 4 Pick. 311: "There seems to be no doubt that, according to the later decisions in England, and several cases in our own books, a tenant for life, years, or for will may, at the expiration of his estate, remove from the freehold all such improvements as were erected or placed there by him, the removal of which will not injure the premises or put them in a worse plight than they were in when he took possession." All that is required of a tenant is to leave the land in as good condition as it was when he received it. When, therefore, a tenant erects expensive structures for carrying on his trade or business, which can be removed with-

out their destruction or material injury to the freehold, the presumption is a rational one that it was not the intention of the tenant to make them permanent accessions to the freehold, and thereby donations to the owner of it. The intention of the tenant, clearly inferable from his situation and relation to the landlord, is the real foundation of the right of removal with which he has been favored. It is true, other reasons of great subtlety, and considerations of public policy, have been frequently assigned for this right of removal, but they are doubtless attributable in some degree to a laudable desire on the part of the courts to carry out the real intention of the party.

It is said that the right of removal must be exercised by the tenant before the expiration of his term, or in some cases within a reasonable time afterwards; that the tenant can remove things which he has attached to the land for the purposes of trade or manufacture where not contrary to some prevailing custom, or where it can be done without material and essential injury to the freehold, or where the erections in themselves were strictly chattels in their nature before they were put up, and can be removed without being entirely demolished or losing their essential character or value: *Amos & Ferard on Fixtures*, 40, 44. All these circumstances furnish considerations bearing upon the intention of the tenant in making the erections, and their temporary nature and want of adaptation to the permanent use and enjoyment of the freehold, and show the application of the criterion here adopted.

The rule requiring actual or physical annexation to the realty is not affected by the few articles sometimes said to belong to the realty upon the principle of constructive annexation, but which, as has already been observed, are not in fact fixtures, but mere incidents to the freehold, and pass with it upon a different principle from that of a fixture. But the extent and mode of the annexation must depend much upon the nature of the article itself, the use to which it is applied, and other attending circumstances.

The rule requiring adaptation to the use or purpose of the realty was recognized in some of the earliest authorities. In the case of *Lawton v. Salmon*, 1 H. Black. 259, note, Lord Mansfield, on a question between heir and executor respecting salt-pans, attached to the land and connected with salt-works at a salt-spring, declared the articles fixtures, upon the principle that they were accessories to the freehold, and necessary to its use

and enjoyment. And it has been adjudged in numerous cases that where an article attached to the realty is accessory to a matter of a personal nature, it should be considered itself as personalty, and removable as such: *Lawton v. Lawton*, 3 Atk. 14; *Dudley v. Warde*, 1 Amb. 113. Where articles were attached to the land for the purposes of trade or manufacture which purposes were considered matters of a personal nature, the articles have been declared not to be fixtures. In the case of *Elwes v. Maw*, 3 East, 54, Lord Ellenborough reviewed the cases from the time of the Year-books, and came to the conclusion that there was a well-founded distinction between articles annexed to the freehold for the purposes of trade or manufacture and those made for the purposes of agriculture—the right of removal existing to a much greater extent in case of the former than in that of the latter. This distinction, however, has been strongly questioned by high authority in this country: *Van Ness v. Pacard*, 2 Pet. 137; *Whiting v. Brastow*, 4 Pick. 310. It was upon this doctrine, which was recognized by Lord Ellenborough, that the rule was laid down that articles annexed to the realty for a mixed purpose of the freehold and of personalty were removable, and not fixtures. Hence it is said that Lord Chief Baron Comyns, as between heir and executor, decided that a cider-mill, firmly fixed in the ground, was accessory to a species of trade, and therefore not a fixture. This distinction, however, as to articles annexed to the realty for a mixed purpose, does not appear to have been consistently recognized in this country.

Numerous exceptions to the rule, that whatever is attached to the realty becomes a part of it, have been adopted in favor, not only of trade and manufacturing, but also in favor of matters of ornamental and domestic use. Some of these exceptions have been based upon public policy, some upon the nature of the article itself, and some upon the ground of the articles being accessory to matters of a personal nature, and not strictly subservient to the use and purposes of the freehold.

But if the third requisite of a fixture here adopted had been applied in the numerous cases of exceptions in favor of tenants, also, in favor of trade and manufacture, and in favor of matters of ornament and domestic convenience, which fill so much space in the books, there would have been but little difficulty in determining that they were not fixtures. In all these cases denominated exceptions, the article could invariably have been removed without essential injury to the freehold or the article itself. In no case is a fixture created without the apparent in-

tention of the party making the annexation to make a permanent accession to the freehold. And whether articles are personal property or fixtures must be determinable and plainly appear from an inspection of the property itself, taking into consideration its nature, mode of attachment, purpose for which used, and the relation of the party making the annexation, and in some instances perhaps other attending circumstances, indicating the intention to make it a temporary attachment or a permanent accession to the realty. And inasmuch as it requires a positive act on the part of the person making the annexation to change the nature and legal qualities of a chattel into those of a fixture, the intention to make the article a permanent accession to the realty must affirmatively and plainly appear; and if it be a matter left in doubt or uncertainty, the legal qualities of the article are not changed, and the article must be deemed a chattel. In some instances the intention to make the article a fixture may clearly appear from the mode of the attachment alone, as where a removal can not be made without serious injury to the property by the act of severance. But where the attachment is but slight, and does not enter into the physical structure of the realty, this intention must be gathered from the nature of the article and the other attending circumstances.

The criterion of a fixture above mentioned must, however, be subject to qualification in some respects. Whatever would otherwise be the rights of the parties connected with an article which has been attached to the realty, they are liable to be controlled by an established custom or the special agreement of the parties. The parties are presumed to be cognizant of an existing usage or custom, and to act with a tacit reference to it. And an article attached to the land may be a fixture or a chattel according to the special agreement of the parties: *Naylor v. Collinge*, 1 Taunt. 19; *Penry v. Brown*, 2 Stark. 403; *Mansfield v. Blackburne*, 6 Bing. N. C. 426.

By an application of the criterion here adopted to the case before the court, there is no difficulty in determining the character of the property in controversy. There was here actual connection with the realty, but it was slight. The bands and straps by which the machinery was attached to the motive power of the steam-engine and boilers could easily be thrown off, and the cleats or means used to keep the machinery steady and in its proper place for use were such as to admit of its removal without injury to any property, or even inconvenience. The

use or purpose to which the machinery was applied was that of a trade or the business of manufacturing, in favor of which the authorities have made numerous exceptions to the principle of fixtures.

It may be said that the building in which the machinery was placed was parcel of the freehold, erected and used for the purpose of manufacturing, and that the machinery was accessory to it, and therefore adapted to the use to which that part of the realty with which it was connected was appropriated. But in truth, the building itself was rather the accessory than the principal. It was in fact accessory to the business or pursuit carried on by the machinery within it, and if not firmly affixed to or founded in the earth in such manner as to show it to be a permanent structure, and intended for a permanent appropriation of that part of the land to which it was attached, it would be movable property itself. This is supported by high authority: See *Elwes v. Maw*, 3 East, 38, and cases there referred to. The business of manufacturing, it has been said, is a pursuit personal in its character, and not strictly subservient to real estate, or essential to the enjoyment of the freehold or inheritance in land. Upon this ground arose the distinction for a time recognized by the courts between articles for agricultural purposes and those erected for the purpose of trade or manufacture.

I would not be understood as saying that the use to which the property in controversy in this case was applied was decisive of its legal character. A manufacturing establishment, including all its essential parts, may unite in the same pursuit, and for producing the same result, portions of real estate with articles of personal property, retaining all the essential qualities of chattels. In the various and complex pursuits of man, real estate and chattels are very frequently united in their application to the same use, without either being made accessory to the other, while both united are made subservient to one common use or purpose.

That this machinery was not intended as a permanent accession to the freehold, and immovable as such, is so clear as scarcely to call for remark. Neither the mode of the annexation nor the use to which it was applied indicated any design to change the character of the property. The nature of the property itself, the customary removal of it from place to place, its liability to be taken away or disposed of and other articles of the same kind supplied to take its place, show that it was not intended to be made a permanent accession to the freehold, and

therefore was not covered by the mortgage of the complainant.

It has been said that the description in complainants' mortgage covered this property even if it were personalty. It is true that where a manufactory or a mill is conveyed or delivered by any general name or description which embraces all its essential parts as such manufactory or mill, the machinery and all the necessary parts of the establishment pass, whether affixed to the freehold or not. Thus things personal in their nature, but fitted and adapted to be used with real estate, and essential to its beneficial enjoyment in such use, may pass with the realty by a conveyance and delivery under such a description, which would not pass by an ordinary conveyance of the land with its appurtenances. But in this case the language in complainants' mortgage, "on which is erected a woollen manufactory," added to the description of the mortgaged premises by the number of the lot, etc., is descriptive of the realty merely.

It is claimed on the part of the complainant that the common-law rule as to fixtures has been somewhat changed by the progress of society and the advancement in the application of machinery to the purposes of manufactures, so as to create a different criterion of a fixture in a manufactory or a mill from that which applies to articles attached to the realty under other circumstances. And upon this ground it is claimed that all the essential parts of a mill or manufactory, whether actually attached to the realty or not, become fixtures, and as such pass by a conveyance of the freehold. This doctrine, which seems to have been recognized in several of the states, derives its origin chiefly from the cases of *Farrar v. Stackpole*, 6 Greenl. 154 [19 Am. Dec. 201], and *Voorhis v. Freeman*, 2 Watts & S. 116 [37 Am. Dec. 490]. The former case does not sustain the position assumed. That was trover for a mill-chain, dogs, and bars attached to a saw-mill. The plaintiff claimed the property by virtue of a deed conveying a "saw-mill with the privileges and appurtenances," upon the grounds: 1. That the articles, whether chattels or fixtures, formed essential parts of the saw-mill, and passed by the sale and conveyance of it as such; and 2. That they were parts of the saw-mill, and went with it by general and uniform usage. The court below ruled against the plaintiff on the first ground, but left the case on the second ground to the jury, which found for the plaintiff. This judgment was sustained by the supreme court,

yet expressing an opinion at variance with the court below as to the first ground. Although some of the reasoning in this case was intended to show that the articles in question were fixtures, yet all that was settled by the adjudication was that the articles, whether fixtures or chattels, passed as essential parts of the saw-mill and its appurtenances, conveyed as such.

The case of *Voorhis v. Freeman, supra*, although professedly based on the principle settled in the case in the state of Maine, goes still further, and determines that machinery which is a constituent part of a manufactory, to the purposes of which the building has been adapted, and without which it would cease to be such manufactory, is part of the freehold, although not actually affixed to it or in physical connection with it. This case was trover for the conversion of one hundred and six soft and chilled rolls belonging to the machinery of an iron-rolling mill in the city of Pittsburg. The plaintiff claimed under a sale on execution as chattel property, and the defendant under a previous sale under a *levari facias*, on a mortgage in which the premises were described as "a lot of ground, with one iron-rolling mill establishment situate thereon, with the buildings, apparatus, steam-engine, boilers, bellows, etc., attached to the said establishment." And the questions simply were, whether the rolls were real or personal property; and if the latter, whether they did not pass by the descriptive terms of the mortgage. The court held that, if chattels, the articles would have passed by force of the word "apparatus" in the description of the premises. But Chief Justice Gibson, reaching the conclusion that "no distinctive principle pervades the cases universally on the subject of fixtures," repudiates the criterion of physical attachment as limited in its range and productive of contradiction, adopts the doctrine of constructive attachment, and attempts to establish a new criterion on the ground of public policy, as applicable to the machinery and implements in a manufactory. The only authority referred to by the learned chief justice which even tends to sustain him is the case of *Farrar v. Stackpole, supra*; and instead of explaining how this new class of fixtures is to become incorporated into the realty and acquire its nature and incidents, he endeavors to maintain his position upon the ground of public policy, holding that it would be "ruinous to the manufacturer in Pennsylvania, where a statute directs that real estate shall not be sold on execution before the rents, issues, and profits shall have been found insufficient to satisfy the debt in seven

years," to allow "a suffering creditor" to seize on execution the loose machinery and implements in a mill, and thus interrupt a "thriving business."

Such is the principle of public policy by which loose and movable property is to be made parcel of the freehold and subjected to what remains of the more permanent and unbending rules of the feudal tenure. Courts have generally declared it to be the policy of the law to guard against all obstacles in the way of creditors. And this is, perhaps, the first instance in which movable property was by constructive annexation adjudged parcel of the realty for the avowed reason that it ought to be placed beyond the convenient reach of the legal process of creditors. The reasoning of Chief Justice Gibson might be legitimate in legislation, but it is not appropriate in judicial proceedings.

To what consequences would such a criterion lead if fully carried out? A cabinet-maker erects a building for a cabinet-shop, and furnishes it with all the necessary machinery, implements, tools, etc., for an establishment for the manufacture of furniture, some of which may be attached to the building. All the machinery, tools, implements, etc., whether actually attached to the building or not, and essential and necessary for the business of the establishment to which the building is adapted, and without which it would not be a perfect and complete establishment of the kind, would be parcel of the freehold. The application of the same rule would convert the benches and essential implements of the shoemaker's shop, the vises, hammers, and machinery of the coppersmith and tinner, and of other mechanics and manufacturers, into realty. And inasmuch as some carry on their business on a much larger scale than others, a question of no little difficulty would arise as to the quantity of the loose implements and machinery which should be deemed essential to make it a complete establishment, and what might be rejected as unessential, and therefore chattels.

It may be inconvenient to the mechanic or the manufacturer to have the movable implements and machinery in his shop taken away upon execution. The same inconvenience, however, may be experienced by the agriculturist, who may be prevented from putting in his crops by a similar removal of his team or farming utensils.

Several decisions have been subsequently made in Pennsylvania, and also in some of the other states, recognizing the doctrine of the case of *Voorhis v. Freeman*, *supra*, but the great

weight of authority, both in England and in the United States, is against it.

We are told by Lord Hardwicke, in the case of *Lawton v. Lawton*, 3 Atk. 15, that since the time of Henry VII. the courts have, from considerations of public policy, been relaxing the strict construction of the law relating to fixtures, and that many articles attached to the realty are now movable which formerly were considered parcel of the freehold. The progress of society and improvements in business and commerce have constantly tended to unfetter property, and especially all movable property, from the rigid rules of the feudal tenure. And no sound considerations of public policy can justify any retrograde change in the legal qualities of any kind of movable property by constructive attachment to the freehold for the purpose of favoring any one particular pursuit or business.

Swift v. Thompson, 9 Conn. 63 [21 Am. Dec. 718], is a leading case in Connecticut, in which it was decided that the machinery of a cotton factory, consisting partly of implements in no way attached to the building and partly of spinning-frames standing upon the floor and kept in their places by cleats about their feet nailed to the floor, and partly of other machinery fastened by wood-screws passing into the floor, all of which could be removed without injury to the building or machinery, was personal property.

The case of *Gale v. Ward*, 14 Mass. 352 [7 Am. Dec. 223], is a leading case in Massachusetts, in which it was held that carding machines in a woolen factory, not nailed to the floor nor in any manner attached to the building, except by the leather band which passed over the wheel or pulley to give motion to the machines, which band could be slipped off by hand, and was taken off and the machines removed from time to time, when repaired, were personal property. Each one of these machines was so heavy as to require four men to move it on the floor, and too large to be taken out at the door, but so constructed as to be easily unscrewed and taken in pieces. In deciding this case, Parker, C. J., said: "They must be considered as personal property; because, although in some sense attached to the freehold, yet they could easily be disconnected, and were capable of being used in any other building erected for similar purposes. It is true that the relaxation of the ancient doctrine respecting fixtures has been in favor of tenants against landlords; but the principle is correct in every point of view."

It has been said that the authority of this case was somewhat shaken by the case of *Winslow v. Merchants' Ins. Co.*, 4 Met. 806 [38 Am. Dec. 368], in which a steam-engine, boilers, etc., and other machinery adapted to be moved by them and connected with them, were decided to be fixtures. But from the peculiar structure of this machinery, the mode of its annexation as well as its adaptation to the use of the building, the court determined that it was permanent in its character, and intended as an accession to the realty. And Shaw, C. J., in giving the opinion of the court, expressly refers to this case of *Gale v. Ward*, *supra*, in terms of approval.

In the case of *Cresson v. Stout*, 17 Johns. 116 [8 Am. Dec. 373], Mr. Justice Platt expressed the opinion that frames in a factory for spinning flax and tow, though fastened by upright pieces extending to the upper floor and cleats nailed to the floor round the feet, would not be considered fixtures.

In *Sturges v. Warren*, 11 Vt. 433, machinery in a woolen factory affixed to the building in the usual manner with nails, screws, and cleats was determined to be personal property.

The same principle was settled in *Trappes v. Harter*, 3 Tyrw. 603, and in *Duck v. Braddyll*, 1 McClel. 217; S. C., 13 Price, 455.

Walker v. Sherman, 20 Wend. 636, is a leading case in New York, in which it was decided, after a very full review of the authorities, that the removable parts of the machinery of a woolen factory, consisting of two double carding machines, a picking machine, shearing machine, spinning machine, looms, etc., were personal property. In this case it was conceded that the other machinery of the factory, consisting of the water-wheel, fulling-mill, dye-kettle, press, and tenter-bars, were fixtures or parcel of the realty.

The recent cases of *Vanderpoel v. Van Allen*, 10 Barb. 157, and *Buckley v. Buckley*, 11 Id. 43, decided in New York, are not understood as varying the doctrine laid down in the case of *Walker v. Sherman* and *Cresson v. Stout*, *supra*.

Substantially the same ground has been taken in the state of Indiana. In the case of *Taffe v. Warnick*, 3 Blackf. 111 [23 Am. Dec. 383], it was held that a carding machine situated in a building erected for the purpose of carrying on the carding business, standing on the floor in its usual place of operation, but not fastened to the building, is personal property. And in *Sparks v. State Bank*, 7 Id. 469, it was held that a steam-engine and boiler placed on a stone foundation, with a brick chimney at one end of the boiler, situated in a tan-yard to facilitate the

business of tanning, and used for several years, but not so fixed but that they could be removed without injury to the building with which they were connected by braces, were fixtures.

Fixtures in a manufacturing establishment must be governed by the same criterion which applies to fixtures in other situations. The machinery and implements in such an establishment, although useful and even essential for the business carried on, which are not permanently affixed to the ground or the structure of the building, and which can be easily removed without material injury to the building or the articles themselves, and their place supplied by other articles of a similar kind, are not fixtures, but personal property. But that portion of the machinery in such an establishment which is firmly affixed to the earth or to the structure of the building, and which from its nature, mode of attachment, use, and the relative situation of the party placing it there, was plainly intended to be permanent, is parcel of the freehold.

The question as to the steam-engine and boilers is not directly involved in this case, the court not being called upon by the defendants to interfere with the decree of the May term for the sale of the mortgaged premises, from which no appeal was taken. The application of the principle, however, adopted in this case, plainly shows these articles to have been fixtures, and therefore parcel of the mortgaged premises. They were bolted and permanently fixed upon timbers, and stone and brick foundations laid in the earth, which were erected for them. The building itself was permanent, and designed and used for a manufactory, and these articles, of a ponderous character, adapted to the production of the motive power of the establishment, were firmly affixed to the structure of that portion of the freehold appropriated to the purposes of the business, and clearly intended to be permanent. This is sustained by the case of *Allison v. McCune*, 15 Ohio, 729 [45 Am. Dec. 605], where the court determined that a steam-engine set on timbers laid on raised walls on the top of the ground, and the machinery of a grist and saw mill attached by coupling-shafts, drivers, and straps, shown to be placed there for permanent use, were adjudged to be parcel of the freehold. And to the same effect is the case of *Powell v. Monson and Brimfield Manufacturing Co.*, 8 Mason, 347, in which Mr. Justice Story has elaborately examined the subject of fixtures.

If it were necessary for the purpose of sustaining the dissolution of the injunction by the common pleas, we should further

hold that the parties having treated the property in controversy as personalty by the execution of the chattel mortgage and other acts, showing that the articles were not intended to be made fixtures, the complainant could not now have a decree for them as having been parcel of the freehold.

3. The injunction having been properly dissolved as to a part of the property only, and that too which had not diminished in value in consequence of the injunction, and which was sold on execution afterwards, and the proceeds of the sale applied upon the judgments, no decree should have been rendered against the complainant for the amount of the judgments at law and the penalty.

The fourth section of the act of March 12, 1845, directing the mode of proceeding in chancery under limited injunctions, provides that on the dissolution of any injunction allowed to enjoin a levy upon or to stay the sale of any particular property by virtue of a levy, "the court shall render a decree for the party enjoined to an amount not exceeding the value of the property levied upon, nor exceeding the amount of the judgment at law and interest thereon and the costs accruing in such injunction proceedings, together with five per centum penalty on such value or judgment and interest," etc.

Courts are not to be confined to the letter of the law in giving it a construction. The maxim, *Hæret in litera hæret in cortice*, is not to be forgotten. A statute must be construed with reference to the subject-matter of it, and its real object and true intent. The provision of law referred to was intended to further the administration of justice and equity. The only penalty imposed is that of the five per centum. The decree authorized for an amount not exceeding the value of the property, nor exceeding the amount of the judgment, is not by way of penalty, but with a view to an equitable compensation for the loss which may be sustained by means of the injunction, and operates simply as accumulative security, so far as it goes, for the payment of the defendant's debts, which could be but once collected. To allow a defendant who had abandoned his levy and obtained satisfaction of his judgment by the sale of other property, or to allow a defendant who had, after the dissolution of the injunction, proceeded and obtained satisfaction, by the sale of the property enjoined, to come in afterwards, and take a decree for the full value of the property levied on, not exceeding the amount of the judgment and interest thereon, etc., together with the penalty of five per centum, would be, to say the least of it, grossly inequitable.

In this case, the injunction was dissolved only as to a part of the property, and continued as to the balance. And it appears that the property was not diminished in value by means of the injunction, and that the defendants proceeded after the dissolution of the injunction on their judgments at law, and sold the property on execution, and applied the proceeds on their judgments. Under these circumstances, the defendants were not entitled to the decree against the complainant which was rendered in the court of common pleas, either for the penalty or the amount of their judgments. From this decree the complainant having properly appealed, it is ordered that the defendants, in whose favor the decree was taken in the common pleas, pay the costs accruing on the appeal, and that the cause be remanded.

FINAL DECREE IS ONE DISPOSING OF SUBJECT OF LITIGATION BEFORE COURT: *Mills v. Hoag*, 31 Am. Dec. 271, and note; *Bank of Mobile v. Hall*, 41 Id. 41; *Ware v. Richardson*, 56 Id. 762; and see *Scott v. Burton*, 55 Id. 782. The principal case is cited to this proposition in *Hinde v. Whitney*, 31 Ohio St. 55; *Brigel v. Starbuck*, 34 Id. 286; *Carpenter v. Canal Company*, 35 Id. 315; and in *Evans v. Dunn*, 26 Id. 444, the definitions of final and interlocutory decrees given in the principal case are quoted with approval. A decree is none the less final because further proceedings before the master are requisite to carry it into effect: *Mills v. Hoag*, 31 Am. Dec. 271; *Bank of Mobile v. Hall*, 41 Id. 41; but a decree can not be treated as so far final and conclusive as to preclude an appeal on a question, where such question was reserved for some future decree of the court: *Ware v. Richardson*, 56 Id. 762.

INTERLOCUTORY DECREE IS ONE WHICH LEAVES EQUITY OF CASE, or some material question connected with it, for future determination: *Evans v. Dunn*, 26 Ohio St. 444, quoting the definition thus given in the principal case; and the effect of an appeal from such a decree is to vacate or suspend the decree until the matter is heard in the appellate court: *Pittsburg etc. R'y v. Hurd*, 17 Id. 145, citing the principal case.

ANNEXATION TO REALTY AS CRITERION OF FIXTURE: See, on the general proposition, *Hunt v. Mullanphy*, 14 Am. Dec. 300, and note; note to *Gray v. Holdship*, 17 Id. 686; *Coombs v. Jordan*, 22 Id. 236; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *Voorhis v. Freeman*, Id. 490; *Mackie v. Smith*, 52 Id. 615; *Providence Gas Co. v. Thurber*, 55 Id. 621.

INTENTION AS CRITERION OF FIXTURE: See, on the general proposition, *Hunt v. Mullanphy*, 14 Am. Dec. 300, and note; note to *Gray v. Holdship*, 17 Id. 686; *Foster v. Mabe*, 37 Id. 749. The principal case is cited in *Fortman v. Goepper*, 14 Ohio St. 558, as not conflicting with the case of *Hill v. Wentworth*, 28 Vt. 329, holding that to change the character of an article from a chattel to a fixture there should be some positive act and intent to that effect on the part of the person annexing it to the building, and if the intent is in doubt, upon an inspection of the property itself, taking into consideration its nature, the mode, extent, and purpose of its annexation, it should be held to be personal property.

INCORPORATION OF CHATTEL WITH REALTY AS CRITERION OF FIXTURE: See *Hunt v. Mullanphy*, 14 Am. Dec. 300; note to *Gray v. Holdship*, 17 Id. 686.

MACHINERY WHEN FIXTURE: See *Kirwan v. Latour*, 2 Am. Dec. 519; *Gale v. Ward*, 7 Id. 223; *Cresson v. Stout*, 8 Id. 373; *Holmes v. Tremper*, 11 Id. 238; *Hunt v. Mullanphy*, 14 Id. 300, and note; *Miller v. Plumb*, 16 Id. 456; *Gray v. Holdship*, 17 Id. 680, and note; *Farrar v. Stackpole*, 19 Id. 201, and note; *Goddard v. Bolster*, 20 Id. 320; *Swift v. Thompson*, 21 Id. 718; *Tobias v. Francis*, 23 Id. 217; *Taffe v. Warnick*, Id. 383; *McKenna v. Hammond*, 30 Id. 366; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *Voorhis v. Freeman*, Id. 490; *Pyle v. Pennock*, Id. 517, and note; *Winslow v. Merchants' Ins. Co.*, 38 Id. 368; *Degraffenreid v. Scruggs*, 40 Id. 658; *Hancock v. Jordan*, 42 Id. 600; *Randolph v. Gwynne*, 51 Id. 265; *Harlan v. Harlan*, 53 Id. 612.

CHATELS WHEN COVERED BY MORTGAGE ON BUILDING: See *Gale v. Ward*, 7 Am. Dec. 223; *Hunt v. Mullanphy*, 14 Id. 300; *Winslow v. Merchants' Ins. Co.*, 38 Id. 368; *Butler v. Page*, 39 Id. 757; *Randolph v. Gwynne*, 51 Id. 265.

THE PRINCIPAL CASE IS CITED in *Hart v. Globe Iron Works*, 37 Ohio St. 77, to the point that probably a tenant has the right to remove fixtures without an agreement.

THOMPSON v. STEAMBOAT JULIUS D. MORTON.

[2 OHIO STATE, 26.]

WHERE COURT HAS NO AUTHORITY TO TAKE COGNIZANCE of the subject-matter of the suit, the proceedings may be dismissed at any stage of the case when that fact is made to appear; but to take advantage of a personal exemption, the objection should be interposed before pleading to the merits.

OHIO STATUTE PROVIDING FOR COLLECTION OF CLAIMS AGAINST STEAMBOATS and other water-crafts navigating waters within and bordering on the state, and authorizing proceedings against the same by name, is not unconstitutional.

ADMIRALTY JURISDICTION OF "CERTAIN CASES UPON THE LAKES AND NAVIGABLE WATERS connecting the same," given by act of congress to the United States district court, is not an exclusive jurisdiction, but concurrent merely with the common-law and statutory remedies authorized in the courts of the several states.

MERE FACT THAT REMEDY UNDER STATE LAW FOR COLLECTION OF CLAIMS AGAINST VESSELS is a proceeding *in rem* instead of being *in personam* furnishes no sound reason for giving an exclusive jurisdiction to the United States courts.

TO BIND DEFENDANT IN PERSONAL ACTION, he must, unless he waive notice by appearance, be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend.

NO PERSONAL NOTICE TO PARTY INTERESTED IS NECESSARY IN PROCEEDING IN REM, the action of the court having relation merely to the thing or property.

SURVIVING PARTNER CAN NOT RECOVER UNLESS PARTNERSHIP FIRM COULD HAVE SUSTAINED ACTION in the life-time of the deceased partner.

OHIO WATER-CRAFT LAW AUTHORIZING PROCEEDINGS IN REM AGAINST VESSELS is merely a cumulative remedy given by statute for the recovery of a claim against the owner himself, and was designed to avoid the difficulty which often exists of ascertaining and proceeding against the owner or owners in person.

ACTION AT LAW CAN NOT BE SUSTAINED BY PARTNERSHIP AGAINST ONE OF ITS MEMBERS for advances made to the latter by the firm.

SURVIVING PARTNER OF FIRM CAN NOT MAINTAIN PROCEEDING IN REM AGAINST VESSEL, of which the deceased partner was the owner, for materials and labor furnished by the firm, for these are advances by a co-partnership to a member of the firm, and a plea setting forth these facts will be good in bar of the action.

ASSUMPSIT. The case was reserved for the decision of this court by the district court of Lucas county. The opinion states the case.

Spink and Murray, for the plaintiff.

Baker and Latimer, for the defendant.

By Court, BARTLEY, C. J. This suit was instituted in the court of common pleas of Lucas county, under the act to provide for the collection of claims against steamboats and other water-craft navigating the waters within and bordering on this state, and authorizing proceedings against the same by name; and was appealed to the district court. The plaintiff declared in *assumpsit*, as the surviving partner of the late firm of Robey & Thompson, for materials, labor, and supplies in the building, repairing, furnishing, and equipping the boat. The defendant pleaded to the action the general issue and two special pleas. To the first special plea the plaintiff demurred, and to the second filed a special replication, to which the defendant demurred. On this state of the pleadings the case is submitted.

As a preliminary question in the case, it is insisted, on behalf of the defense, that the law under which the suit has been brought is unconstitutional; and upon this ground we are asked to dismiss the suit for want of jurisdiction. The plaintiff urges, however, that this objection comes too late after a plea to the merits. If this law be unconstitutional and void, the court has no jurisdiction over the subject-matter of the suit, and therefore could render no valid judgment against the boat. To take advantage of a personal exemption, the objection should be interposed before pleading to the merits; but where the court has no authority to take cognizance of the subject-matter of the suit, the proceedings may be dismissed at any stage of the case when that fact is made to appear.

The objection to the constitutionality of the law is founded upon the supposition that the law confers a jurisdiction upon the state courts which conflicts with the admiralty and maritime jurisdiction conferred by the constitution of the United States on the federal courts; and also upon the fact that it provides for no notice to the owner of the boat, or other person interested therein.

It is true that the constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction;" and by the judiciary act of the twenty-fourth of September, 1789, the district courts of the United States are invested with "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." But it has been, perhaps correctly, said that the exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction is to be understood to be exclusive as between the district and circuit courts of the United States, and that the jurisdiction may be concurrent with that of the courts of common law, in cases in which a common-law remedy may be adequate and proper, since the judiciary act of 1789 expressly "saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it:" 1 Kent's Com. 333.

Under the constitutional grant of power the admiralty and maritime jurisdiction of the United States courts was, until recently, limited to cases arising on the high seas and on tide-waters. And the state courts, within the limits embraced by the law of 1789, have always exercised a concurrent jurisdiction in cases arising within their respective territories.

An act of congress of the twenty-sixth of February, 1845, extended the admiralty forms of remedy in the federal courts "to certain cases upon the lakes and navigable waters connecting the same." This law was adjudged to be constitutional by the supreme court of the United States in the case of *Genesee Chief v. Fitz Hugh*, 12 How. 443; but it was held to confer a jurisdiction concurrent merely with the common-law and statutory remedies authorized in the courts of the several states. And it would seem strange even that this should ever have been made a question, since this act of congress in the concluding clause of it contained the following express provision: "Saving to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the state laws, where such steamer or other vessel is employed in such business of commerce and navigation."

The mere fact that the remedy under the state law, which is objected to, is a proceeding *in rem* instead of being *in personam* furnishes no sound reason for giving an exclusive jurisdiction to the United States courts. There is nothing in the nature or character of the subject-matter which requires its removal from the jurisdiction of the state courts; and the purposes of justice would certainly not be advanced by it.

The other objection has doubtless arisen from confounding the requisites of a proceeding *in personam* with those of proceeding *in rem*. By the former the court acts upon its jurisdiction over the person, by the latter upon its jurisdiction over the property itself, which is taken and held within the power of the law. It is undoubtedly a general if not a universal rule, that in order to bind a defendant, or to confer any rights upon a plaintiff, by force of a judgment in a personal action, the defendant, if he does not waive a notice by an appearance, must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend. But the rule is different in a proceeding *in rem*, where the action of the court has relation to the thing or property, which it binds in the absence of any personal notice to the party interested: Story's Conf. L., c. 14, sec. 549; *Boswell v. Otis*, 9 How. 336.

The first special plea of the defendant sets forth that at the time of the making of the supposed promises in the declaration mentioned, said steamboat was owned and possessed by Charles C. Robey, who was then and there a copartner doing business with said Isaac P. Thompson, and that all the materials, supplies, and labor in the declaration mentioned were the property of said firm of Robey & Thompson as such copartners, and were by them as such applied and appropriated in the building, repairing, furnishing, and equipping of said boat. Do the facts set up in this plea constitute a sufficient bar to the action?

The plaintiff Thompson sues as the surviving partner of the firm of Robey & Thompson. The death of Robey can not vary the legal principles upon which the action is founded. The plaintiff in this action can not recover unless Robey & Thompson could have sustained the action in the life-time of Robey.

It is well settled by the course of decisions in Ohio, that the object of this water-craft law was to provide a convenient and efficient remedy by subjecting the liability of the boat or vessel itself, and thus avoid the difficulty which often exists of ascertaining and proceeding against the owner or owners in person. The second section of the law gives the person having the de-

mand the option to proceed against the owner, the master, or the craft itself. By the first clause of the first section, which contains the provision under which this action is brought, the proceeding is authorized against the craft upon a liability sounding in contract.

This contract is one to which the owner is a party, and upon which he is himself personally liable. The craft itself is endowed with no capacity to become a party to a contract. The law simply authorizes the craft to be made liable upon seizure by a proceeding *in rem*. It is true, the craft is named as the defendant in the proceeding, but this does not constitute it an artificial person with capacity to contract. This proceeding, therefore, is only an accumulative remedy given by the statute for the recovery of a claim against the owner himself. To authorize the owner of a boat or vessel to institute a suit upon his own liability and against his own property would be, to say the least of it, a gross absurdity.

Does the fact that the advances were made by a copartnership firm of which Charles C. Robey, the owner of the boat, was a member affect the principles which sustain this action at law? The materials, supplies, etc., furnished to the boat were in fact advances to the owner of the boat; and therefore no other than advances by the copartnership to a member of the firm, for which he is liable upon the principles which govern partnership transactions. But it has never been claimed that an action at law can be sustained by a partnership against one of its members for advances by the firm.

To allow the owner, either individually or as a member of a copartnership, to maintain an action against the craft itself would afford facilities for frauds against purchasers and persons having claims and relying upon the liability of a boat or vessel, which it is the policy of the law to guard against.

The facts set up in this plea, therefore, constitute a sufficient defense to this action, and the demurrer to the plea will be overruled.

This disposes of the whole case, and it does not become necessary to decide the question arising upon the second special plea.

Judgment for defendant.

PERSONAL PRIVILEGE EXEMPTING FROM JURISDICTION IS WAIVED by pleading to the merits, or submitting to answer without raising the objection: *Harrison v. Harrison*, 56 Am. Dec. 227; see *Ex parte Cheatham*, 44 Id. 525, and note.

NECESSITY OF NOTICE TO DEFENDANT TO GIVE JURISDICTION: See note to *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 270.

MARITIME JURISDICTION IS VESTED IN UNITED STATES DISTRICT COURT CONCURRENTLY with the common-law courts: *Case v. Woolley*, 32 Am. Dec. 54, and see the note to that case.

ADVANCES TO FIRM, AND ADVANCES FROM IT TO ONE OF ITS MEMBERS, do not constitute debts, but are only items in the account between the partners in the winding up of the concern: *Wilson v. Soper*, 56 Am. Dec. 573, and note.

ACHESON v. MILLER.

[2 OHIO STATE, 203.]

RULE THAT NO CONTRIBUTION LIES BETWEEN TRESPASSERS applies only to cases where the persons have engaged together in doing wantonly or knowingly a wrong.

CONTRIBUTION LIES BETWEEN TRESPASSERS, where one of several persons who join in performing an act which to them appears to be right and lawful, but which proves to be a tort, has paid the amount of the damage.

TITLE OF GOODS IS TRANSFERRED TO DEFENDANT UPON RECOVERY IN TRESPASS OR TROVER by the plaintiff of the value of the specific chattels of which the possession has been acquired by tort.

TITLE BY JUDGMENT GIVES ABSOLUTE RIGHT TO PROPERTY.

ONE ELECTING TO PROCEED IN TRESPASS OR TROVER FOR TAKING OR CONVERSION of personal property abandons his property to the wrong-doer at that time and proceeds for its value; so that when judgment is obtained and satisfaction made, the property is vested in the defendant by relation as of the time of the taking or conversion.

SURETIES OR INDORSERS AGAINST WHOM JUDGMENT HAS BEEN RENDERED, and who have obtained title to property under a judgment rendered against them in an action of trespass brought by one upon whose goods they levied by mistake as upon the property of the principal, and who have sold this property and applied it to the satisfaction of the judgment against them, may enforce contribution from co-sureties in a proportionate amount of the sum applied to the satisfaction of the judgment against them.

RETROSPECTIVE LAWS AFFECTING REMEDIES ARE NOT UNCONSTITUTIONAL.

ERROR to the common pleas of Trumbull county. The opinion states the case.

J. Crowell, and Swan and Andrews, for the plaintiff in error.

M. Burchard, and Sutliff and Tuttle, for the defendants in error.

By Court, CALDWELL, J. The suit in the court below was one for contribution. The plaintiff in the action, and the defendant with four others, were the sureties for Garry Lewis on a draft for five thousand dollars. Lewis became insolvent, and judgment was rendered against all the indorsers, and also a

judgment against Lewis, the principal. Execution was issued, and four of the indorsers, of whom Reuel Miller was one, having indemnified the sheriff, directed him to levy on a store of goods recently the property and in the possession of Garry Lewis, the principal debtor, but which goods were assigned about that time to Daniel Gilbert. Gilbert brought suit against the sheriff and the four indorsers that directed him to levy, and recovered a judgment for the sum of five thousand three hundred and fifty-four dollars and sixty-one cents, the value of the goods, which judgment was paid off by these four indorsers. Miller paid the one fourth of it. The goods were sold by the sheriff, and applied on the judgment, and paid on it three thousand one hundred and thirty-five dollars and seventy-three cents. Acheson, not having anything to do with the levy on the goods, has paid nothing, and this suit was brought by Miller against Acheson to require him to contribute his share of the three thousand one hundred and thirty-five dollars and seventy-three cents paid on the judgment by the sale of the goods.

On the trial in the court of common pleas, after the plaintiff had given in his evidence and rested, the defendant moved for a nonsuit, which the court refused, and gave judgment for the plaintiff. The defendant presented a bill of exceptions, setting forth the evidence, which was signed and made a part of the record. The question presented on this record is, whether contribution can be had in such a case.

It is said, on the part of the plaintiff in error, that Miller and those who acted with him were wrong-doers—that they committed a trespass in having the goods levied on, and that therefore he is not entitled to contribution for the payment made by the proceeds of such goods.

The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them.

In such case, if one of the parties who has done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion? The common understanding and justice of humanity would say that it would be just and

right that each of the parties to the transaction should pay his proportion of the damage done by their joint act; and we see no reason why the moral sense of the court shall be shocked by such a result. And we think this view of the case is fully sustained by the cases cited by counsel for the defendant in error. In the case of *Adamson v. Jarvis*, 4 Bing. 66, in speaking on this subject, Best, C. J., says: "From the concluding part of Lord Kenyon's judgment in *Merrywether v. Nixan*, 8 T. R. 186, and from reason, justice, and sound policy, the rule that wrong-doers can not have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing a wrong."

The same doctrine is distinctly laid down in the case of *Bells v. Gibbins*, 2 Ad. & El. 57. From these and other cases referred to, we think the reasonable and common-sense rule and the legal one are the same, viz.: that when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere.

But the question arises whether this is a case where contribution is sought between wrong-doers. We think not. The suit in this case is not brought by Miller for contribution towards the amount he has paid in the judgment in trespass, but for Acheson's proportion of the amount paid on the judgment by the sale of the goods. These goods, by the judgment and satisfaction in the trespass case, became the property of the defendants in that case.

"On a recovery by law in an action of trespass or trover of the value of a specific chattel, of which the possession has been acquired by tort, the title of the goods is altered by the recovery, and is transferred to the defendant; and the damages recovered are the price of the chattel so transferred by operation of law:" 2 Kent's Com. 387. Title by judgment is one of the ways by which an absolute right to property may be obtained. When a person has obtained a legal title to property he has the right to use it in the way in which such property is used, without reference to the manner in which he may have obtained it. If he sell it he can recover the price, or if it is injured he can recover damages for such injury.

It is said, however, that at the time these goods were sold and applied on the judgment, the action of trespass had not been determined. This we think could make no difference. Where a party, for an injury to his property, elects to proceed

by an action of trespass or trover for its value, the whole proceeding relates to the time of the taking or conversion; the controversy all relates to the property as of that time; the criterion of damages is the value of the property at the time of such taking or conversion. The party in effect abandons his property as of that time to the wrong-doer, and proceeds for its value; so that when judgment is obtained and satisfaction made, the property is vested in the defendants, by relation, as of the time of the taking or conversion. And this view of the case appears to be fully sustained by the authorities to which our attention has been called: See the cases of *Daniel v. Holland*, 4 J. J. Marsh. 18; *Hepburn v. Sewell*, 5 Har. & J. 211 [9 Am. Dec. 512]; *Howard v. Smith*, 12 Pick. 202.

The questions in this case were differently ruled in *Acheson v. Miller*, 18 Ohio, 1; but this court, having come to the conclusion that the decision there made is not in accordance with the principles of law, have felt bound to overrule it.

There is another ground upon which this case might be placed, and the same result arrived at. The statute of March 19, 1850, applies to this case. The third section describes a case precisely like the present, and enacts that in all actions then pending or that should be thereafter instituted, contribution should be had. It is said, however, on the part of the plaintiff in error, that this suit was pending at the time of the passage of that act, and that so far as it is retrospective, it is unconstitutional and void. From the view which we have taken of this case, we do not think it necessary to go into an examination of that question.

That statute, as we think, did not change the law; but was merely declaratory of it as it had been and was at the time of its passage. But even if it had changed the law, we could not say that it came in conflict with the constitution then in existence. Retrospective laws of this kind have frequently been passed, and have been decided by our own as well as other courts to be valid, in the absence of any specific constitutional prohibition. We do not discover any error in the record of the court of common pleas; the judgment of that court will therefore be affirmed.

RANNEY, J., having been of counsel in this cause, took no part in its decision.

RIGHT OF CONTRIBUTION BETWEEN CO-SURETIES, NATURE OF: See *White v. Banks*, 56 Am. Dec. 283, and note citing prior cases. See also *Fletcher v. Jackson*, Id. 98; *Pike v. McDonald*, 54 Id. 597.

POWER OF LEGISLATURE AS TO REMEDIAL LEGISLATION: *Lycoming v. Union*, 53 Am. Dec. 575, and note citing prior cases; *Baughner v. Nelson*, 52 Id. 694.

RECOVERY OF JUDGMENT IN TRESPASS OR TROVER AND SATISFACTION THEREOF vests title to personal property in wrong-doer: *Williams v. Otey*, 47 Am. Dec. 632; *Marsh v. Pier*, 26 Id. 131; *Hepburn v. Sewell*, 9 Id. 512; *Woolley v. Carter*, 11 Id. 520; *Floyd v. Browne*, 18 Id. 602, and notes; *White v. Martin*, 26 Id. 365; see *King v. Chase*, 41 Id. 675. Decree in equity operates in *personam*, and can not *per se* divest legal title to real property: *Proctor v. Ferebee*, 36 Id. 34, and note on this subject 37 et seq. See also *Fuller v. Hubbard*, 16 Id. 423; *Taylor v. Boyd*, 17 Id. 603. Recovery in *assumpsit* for sale of goods vests title in the defendants: *Marsh v. Pier*, 26 Id. 131.

LITTLE MIAMI RAILROAD CO. v. NAYLOR.

[2 OHIO STATE, 235.]

RAILROAD COMPANY HAVING ONCE LOCATED THEIR ROAD, under a charter that fixes merely a few points through which the road is to pass from its commencement to its terminus, leaving the location of the road between the points specified to the discretion of the corporation, has no right to change the location either upon the property of an individual or from one part of a street or highway to another.

RAILROAD COMPANY IS LIABLE FOR DAMAGE CAUSED TO GROCERY AND DWELLING by a relocation of their road upon a public street so that the track lay near the premises, thereby depreciating their value.

ACTION LIES AS WELL FOR DAMAGE TO ADJOINING PROPERTY by stopping or impeding the travel on, to, or from a street or highway as for any other damage that can be done to property, although the property injured may not be touched by the obstruction.

ERROR to the district court of Hamilton county. The opinion states the case.

Charles Fox, for the plaintiff in error.

Storer and Gwynne, for the defendant in error.

By Court, CALDWELL, J. This is a writ of error to the district court of Hamilton county. The original proceeding was an action on the case brought by the defendant in error, William Naylor, against the railroad company, for damage which he alleged had been done to a house and lot belonging to him, in the town of Fulton, on account of the company having changed the location of their road. The defendant pleaded not guilty, and the cause was submitted to a jury, who found a verdict for the plaintiff, on which judgment was rendered.

From the bill of exceptions, it appears that it was proved on the trial that the railroad company had located their road on a

public street in the town of Fulton, about sixty feet wide, which was also used by the Cincinnati, Columbus, and Wooster Turnpike Company; that in 1848 the railroad company changed their track, and located the road off the street, merely using the street for the purpose of passing from the south to the north side thereof. In thus crossing the street the track ran within a few feet of the premises of Naylor. In the opinion of the witnesses, the property was much injured by the relocation of the road; the house, which was a three-story frame house, and which was used as a grocery and dwelling, was, in their opinion, ruined as a grocery stand, and its value much impaired as a dwelling. On the trial, the court were asked to charge several distinct propositions, which were refused by the court, the substance of which is, that the railroad company by their charter have the right to use this street for the purpose of laying their track; that they had a right to change the track on the street, and would not be liable in an action for such change if the road as relocated did not touch the property of the plaintiff.

The court, on the contrary, charged the jury, substantially, that the defendants having located their road could not without express authority legally change the location on the street, and if by such unauthorized location the property of the plaintiff was damaged, he would have a right to recover from the company for such damage, although the track of the road did not pass over his property. In thus ruling, it is said the court of common pleas erred.

The first question which we propose to consider is, whether the railroad company had a right to change the location of their road on this street.

The charter of the Little Miami Railroad Company, like most charters of the kind, merely fixes a few points through which the road is to pass from its commencement to its terminus, leaving the location of the road between the points specified to the discretion of the corporation. The location of a railroad through a settled country will always produce a great change in the use of the property along its track. Improvements are made in reference to the track as located. To change the track, in many instances will produce as great damage to property as the making of a new road. The strip of country from which the road may select its track is frequently several miles in width. This extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track; its right to it

is simply one of selection, and when it has made its selection, its rights over all the other territory cease. This principle is distinctly decided in the case of *Moorhead v. Little Miami Railroad Co.*, 17 Ohio, 349. It was there held that the railroad company having once located the road, their power to relocate, and for that purpose to appropriate the property of an individual, had ceased. It is said, however, that the present case differs from the case of *Moorhead v. Little Miami Railroad Co.*, *supra*, in this, that that was the case of an attempt to relocate on the property of an individual, whereas the present is merely using a street or highway for that purpose. We do not think there is any difference in principle between the two cases. The railroad company had no right to use the street at all except by the permission of the legislature; the grant to use the street for a track did not give them the property in it to the exclusion of the public; they could only lay their track and run it, doing as little damage to the road, as a highway for general travel, as possible. The property bounding on it would be used and improved in reference to the railroad as located, which every person interested would be authorized in supposing to be permanently fixed. In a town, the free ingress and egress to the street are indispensable to the use of the property fronting on it.

The twelfth section of the charter of the company provides that "whenever it shall be necessary for the construction of the railroad to intersect or cross any stream of water or watercourse, or any road or highway, lying in or across the route of said road, it shall be lawful for the corporation to construct the said railway across or upon the same; but the corporation shall restore the stream, or watercourse, or road, or highway thus intersected to its former state, or in a sufficient manner not to impair its usefulness; and if said corporation, after having selected a route for said railway, find any obstacle to continuing said location, either by the difficulty of construction, or procuring right of way at reasonable cost, or whenever a better and cheaper route can be had, it shall have authority to vary the route and change the location." The first part of this section of the charter shows clearly that where the company construct their road along a public thoroughfare, they do not thereby obtain an absolute control over such thoroughfare, but the rights of the public over the same are still, as far as may be, preserved. The latter part of the section is very pertinent on the subject of location. It gives the company the right to change the selected location; but from the state of case provided for (where

the route selected is difficult of construction, there is difficulty in procuring the right of way, etc.), it is evident that the change of location provided for is before the road is made, and is in fact only a change of selection. If it were thought necessary by the legislature to give express authority to change the location before the road was made, much more would it be necessary to give express power to change after the road had been finished. We are of opinion, then, that the superior court of Cincinnati did not err in charging the jury that the railroad company, having once made their road on this road or street, had not the right to change its location.

The act of the railroad company in changing their location being unlawful, the next question arises, whether they are liable to the defendant in error for the damage which he has sustained by such relocation. It is contended that inasmuch as the road as relocated does not touch his property, the company can not be made liable. It is a general principle of law, that a person is liable for all the damage done by his illegal act, and this, whether the injury was intended or not. It is well settled that an action lies as well for damage to adjoining property by stopping or impeding the travel on, to, or from a street or highway as any other damage that can be done to property, although the property injured may not be touched by the obstruction: See *Fletcher v. Auburn etc. R. R. Co.*, 25 Wend. 462; *Bingham v. Doane*, 9 Ohio, 166, 168; *Glover v. North Staffordshire R. R. Co.*, 5 Eng. L. & Eq. 339; *Wilkes v. Hungerford Market Co.*, 29 Eng. Com. L. 336.

We are of opinion, from an examination of the whole case, that the rulings of the superior court of Cincinnati are in accordance with law, and that the district court, in affirming its judgment, decided correctly.

The judgment of the district court will therefore be affirmed.

FKE IN HIGHWAY IS IN OWNER OF ADJACENT LAND, and he may maintain trespass against any one obstructing the same: *Lewis v. Jones*, 44 Am. Dec. 138, and note citing prior cases: *Transylvania University v. Lexington*, 38 Id. 173; and see note to *Mayhew v. Norton*, 28 Id. 302, which treats of the nature of the property an adjoining owner has in the highway.

WORK v. STATE.

[2 OHIO STATE, 296.]

ESSENTIAL FEATURES OF TRIAL BY JURY AS KNOWN AT COMMON LAW were intended to be preserved and its benefits secured to the accused in all criminal cases by the provisions of the Ohio constitution, that "the right of trial by jury shall be inviolate," and that "in any trial in any court" the party accused shall be allowed "a speedy public trial by an impartial jury of the county."

NUMBER OF JURY AT COMMON LAW MUST BE TWELVE, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had.

DIMINISHING NUMBER OF JURORS IMPAIRS RIGHT OF TRIAL BY JURY.

NUMBER OF JURORS NECESSARY AT COMMON LAW CAN NOT BE DIMINISHED, nor a verdict authorized short of a unanimous concurrence of all the jurors by the general assembly of Ohio; and the statute of 1853 authorizing a conviction upon the finding of a jury of six is void.

ACT ALLOWING JURIES OF SIX MEN BEFORE JUSTICES OF PEACE is not unconstitutional, under a constitution protecting right of jury trial as at common law, for juries were not required in these courts at common law, and in such case a jury of any number may be authorized within the discretion of the legislative body.

ERROR to the probate court of Hocking county. The opinion states the case.

H. H. Hunter, for the plaintiff in error.

George W. McCook, attorney general, for the defendant in error.

By Court, **RANNEY, J.** We shall notice but one of the errors assigned, as in the opinion of the court that is decisive of the case, and upon a ground that precludes the possibility of remanding it for another trial. The plaintiff in error was charged with the offense of assault and battery, tried by a jury of six men under the act of March 14, 1853, "defining the jurisdiction and regulating the practice of probate courts," found guilty, and sentenced to pay a fine of one hundred dollars and costs. He objected to the proceeding in various ways during its progress; and now insists that the act under which it was had, in so far as it authorizes a conviction upon the finding of such a jury, is unconstitutional and void.

Two sections of the first article of the constitution are relied upon. Section 5 provides: "The right of trial by jury shall be inviolate." In section 10 it is provided: "In any trial, in any court, the party shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the

accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense."

By the first of these sections the right of jury trial is recognized to exist, and its continuance unimpeached is provided for. By the last this right is declared to belong to every person accused of any crime or offense, in any court of the state.

What, then, is this right? It is nowhere defined or described in the constitution. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind. The same article furnishes other examples of the same generality of expression. By the eighth section, "the privilege of the writ of *habeas corpus* shall not be suspended, unless in case of rebellion or invasion the public safety require it." In what does the privilege of this great bulwark of personal liberty consist? The constitution furnishes no answer, nor was it necessary that it should. If ages of uninterrupted use can give significance to language, the right of jury trial and the *habeas corpus* stand as representatives of ideas as certain and definite as any other in the whole range of legal learning.

The institution of the jury referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter, and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same brought to this continent by our forefathers, and perseveringly claimed as the birthright in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind in waging the contest which resulted in independence. Nor did their affection for it then diminish or cool. They made it a corner-stone in erecting the state governments; and after the adoption of the federal constitution without a provision securing it, they did not rest satisfied until they had proposed and carried an amendment giving to every person accused of crime in the courts of the Union "the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

In the ordinance of July 13, 1787, which first extended civil government over the territory north-west of the river Ohio, it was made an unalterable article of compact that "the inhabitants of the said territory shall always be entitled to the benefit of the writ of *habeas corpus* and of the trial by jury." Upon the organization of the state government in 1802, provisions substantially the same as those in the present constitution were inserted in the bill of rights. It thus appears that persons accused of crime have, for every moment of time since civil government existed within the territory of this state, by fundamental laws, been secured in the right of trial by jury. An institution that has so long stood the trying tests of time and experience, that has so long been guarded with such scrupulous care, and commanded the admiration of so many of the wise and good, justly demands our jealous scrutiny when innovations are attempted to be made upon it.

It remains to consider what were the distinguishing features of this mode of trial as it existed at common law, and as it has always been known and used in this country. I do not propose to attempt to discover its origin or to determine at what time or by whom it was first introduced into England. Able men, with all the information to be had, have differed upon it. The distinguished commentator upon the laws of England informs us that traces of it are to be found in the laws of all those nations which adopted the feudal system, "who had all of them a tribunal composed of twelve good men and true;" and that "the truth seems to be that this tribunal was universally established among the northern nations, and so interwoven in their very constitution that the earliest accounts of the one give us also some traces of the other:" 3 Bla. Com. 349, 350. After delineating with admirable clearness the means the law has provided to secure the independence, purity, and impartiality of the jury, and painting in glowing colors the many advantages of this mode of trial, this author proceeds to say: "Upon these accounts, the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases. But this we must refer to the ensuing book of these commentaries, only observing for the present that it is the most transcendent privilege which any subject can enjoy or wish for, that he can not be affected either in his property, his liberty, or his person but by the unanimous consent of

twelve of his neighbors and equals. A constitution that, I may venture to affirm, has, under providence, secured the just liberties of this nation for a long succession of years:" 3 Bla. Com. 379.

Pursuing the same subject in the fourth book of his commentaries, in its application to criminal prosecutions he characterizes it as the bulwark of the liberties of Englishmen; and affirms that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, must be confirmed by the unanimous suffrage of twelve of his equals and neighbors, and superior to all suspicion, before the accused can be subjected to any manner of punishment: 4 Bla. Com. 349, 350.

We have extracted somewhat at length from this eminent author, for the purpose of showing beyond controversy the number of the jury at common law, as well as the other essential elements of its constitution and action. The number must be twelve, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had. We might cite other writers to the same purpose, but it can not be necessary.

We are of opinion it was this very tribunal, thus constituted, that those who framed and adopted the constitution of this state intended to perpetuate and make the safeguard of innocence, by securing its benefits to every person accused of crime in any of its courts.

There is certainly nothing in our history which points to a different conclusion. For half a century before its adoption, similar provisions had been so considered and acted upon. Until the passage of this law no person had ever been convicted of crime by less than the concurring assent of twelve of his peers; and no law had ever attempted to authorize it to be done.

If the power exists to diminish the number of the jury, it may be applied to all cases, and it may be reduced to two as well as to six. The same constitutional provision that secures the right in a charge involving the life of the accused secures it also in every other criminal case. It is no answer to say that this would not likely be done. If it had been deemed safe to leave it to the discretion of the general assembly, no constitutional provision was needed; but whether needed or not, it has been ordained by a power which both the general assembly and this court are bound to obey.

A moment's consideration will show that diminishing the

number impairs the right, lessens the security of the accused, and increases the danger of conviction.

If corruption or prejudice are to be feared and avoided, they are much more likely to influence the conduct of six men than of twelve; and if the jury are honest, impartial, and pure, it is a self-evident fact that the chances of a conviction upon conflicting evidence by the unanimous approval of the larger number is many times less than by the smaller. Nor is a conviction, even in cases to which this act extends, a matter to be lightly considered. The reputation and hopes of a man, and all those who stand connected with him, may be as effectually blasted by an unjust verdict of guilty upon a charge of petty larceny as for many crimes of much higher grade.

But without pursuing these considerations further, our opinion is, that the essential and distinguishing features of the trial by jury as known at the common law, and generally if not universally adopted in this country, were intended to be preserved, and its benefits secured to the accused in all criminal cases, by the constitutional provisions referred to; that it is beyond the power of the general assembly to impair the right or materially change its character; that the number of jurors can not be diminished, or a verdict authorized short of a unanimous concurrence of all the jurors. It follows that the act under which this conviction was obtained, in so far as it provides for a jury of six only, and authorizes a conviction upon their finding, is unconstitutional and void.

In coming to this conclusion, we have not referred to the decisions in other states, because we were entirely willing to take the responsibility of considering the question upon principle alone. The question has seldom arisen, but whenever it has, the same result has followed without a single dissenting opinion or *dictum* to the contrary, so far as we are advised.

We have deemed it our duty to meet and arrest, at the outset, what we can not but regard as an infringement of a great constitutional right; not in a very flagrant manner, but nevertheless opening the door to further encroachments. So far as the argument of convenience and expedition is concerned, we can not do better than to reply in the language of Justice Blackstone: "However convenient these may appear at first (as doubtless all arbitrary powers well executed are the most convenient), yet let it be again remembered that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon

this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the most momentous concern:" 4 Bla. Com. 350.

It would not be appropriate, nor do we intend, to extend this opinion to determine the application of the right of trial by jury in civil cases. It is, however, well known that it never extended to all courts having civil jurisdiction, nor to the trial of all disputed facts.

The fifth section of article 13 has sometimes been referred to as containing by implication a warrant for supposing it was intended to authorize a jury of less than twelve by the section of the constitution which we have been considering. This section relates to the compensation required upon appropriating the right of way to the use of a corporation authorized to construct a public improvement, and provides that such "compensation shall be ascertained by a jury of twelve men, in a court of record as shall be prescribed by law."

Why, it is asked, fix the number here, if the term "jury" used in other sections *ex vi termini* implies that number? The reason is obvious, and the answer plain. It had been held in *Willyard v. Hamilton*, 7 Ohio, pt. 2, 115 [30 Am. Dec. 195], that the value of property taken for public uses might rightfully be assessed by commissioners, it not being a case for trial by jury secured by the constitution; and that the proceeding need not be had in a court of justice. And the reason why it was not secured by the constitution was that it had never been so regarded in England or this country prior to the adoption of that instrument. This course of proceeding by commissioners had been much complained of as unjust and oppressive to the owner of the property; and to make at once a proceeding within the protection of the constitution and to be pursued in a court of justice with a common-law jury, this fifth section of the thirteenth article was inserted when the constitution was revised.

It intended to afford the party the same protection as in other cases of jury trial: no more and no less; and if any inference is to be drawn from specifying the number of the jury, it is very strong evidence of the sense of the convention, that that was what had already been secured by the other sections to suitors in other cases.

We do not intend to imply a doubt of the constitutionality of the act allowing juries before justices of the peace composed of

six men. Wherever facts are to be found in any proceeding, in which a jury was not required by the common law, a jury of any number may be authorized, within the discretion of the legislative body. Juries did not belong to these inferior courts at the common law, and so long as an appeal is provided for to the common-law courts from their determinations, it is clear no constitutional objection can arise, whether facts are found by the magistrate or by the aid of a jury of any number of men. These questions were long since settled in *Emerick v. Harris*. 1 Binn. 416, and other cases in Pennsylvania.

The judgment must be reversed.

BARTLEY, J., dissented.

CONSTITUTIONALITY OF STATUTES DENYING RIGHT OF TRIAL BY JURY: See *McGinnis v. State*, 49 Am. Dec. 697; and note to *Flint River Steamboat Co. v. Roberts*, 48 Id. 185, discussing the subject at length. See also *Flint River Steamboat Co. v. Foster*, Id. 248.

RIGHT OF JURY TRIAL BEFORE JUSTICES OF PEACE.—In *McGinnis v. State*, 49 Am. Dec. 697, it is held that the constitutional right of jury trial upon "criminal charges" is not extended to misdemeanors. The principal case is cited to the point that this right does not apply to trials before justices of the peace, in *Warner v. Railroad Co.*, 31 Ohio St. 265, 268.

NUMBER OF JURY AT COMMON LAW NEVER LESS THAN TWELVE: *Carpenter v. State*, 34 Am. Dec. 116. In *assumpsit* it is no ground of error that it consisted of thirteen: *Tillman v. Ailles*, 43 Id. 520. The principal case is cited in *McGill v. State*, 34 Ohio St. 228, 254, in dissenting opinion, to the point that the number of the jury must be twelve, that they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had; in *Hill v. People*, 16 Mich. 355, to the point that in adopting and retaining the right of trial by jury a state constitution tacitly refers to and adopts the common-law number; in *Tabor v. Cook*, 15 Id. 325, to the point that the intention of the Michigan constitution is to preserve to parties the right to have their controversies tried by jury in all cases where the right existed at the time of its adoption; and to the point that all the jurors must concur in order to authorize a verdict, in *Kent v. Perkins*, 36 Ohio St. 639, 641.

KIRBY v. HARRISON.

[2 OHIO STATE, 826.]

TIME MAY BE MADE OF ESSENCE OF CONTRACT BY EXPRESS STIPULATION OF PARTIES, or, without such express agreement, by the nature of the contract itself or of the circumstances under which it was made; as where the benefit to accrue from the consideration to be paid or the conveyance to be executed materially depends upon a strict performance in point of time.

TIME MAY BE MADE ESSENTIAL IN CONTRACT BY PROPER ACTION of a party who is not in default and is ready to perform, if the other party is in default without justification; as if a vendee without excuse fail to pay at the stipulated time, and the vendor is in no default, and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time or consider the contract rescinded. In like manner and with like consequences the vendee may notify the vendor if the latter is in default and the former is not.

SPECIFIC PERFORMANCE WILL NOT BE GRANTED when the party applying has omitted to execute his part of the contract at the appointed time though not notified to do so, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay.

RESCISSION OF CONTRACT WILL GENERALLY BE DECREED WHERE SPECIFIC PERFORMANCE WOULD BE REFUSED, though it is undoubtedly within the sound discretion of the chancellor to refuse the rescission and leave the parties to their legal remedy.

RESCISSION SHOULD BE DECREED AGAINST PARTY IN GROSS DEFAULT, where the circumstances and value of the property have materially changed.

VENDOR AND VENDEE DO NOT STAND IN RELATION OF MORTGAGEE AND MORTGAGOR, so that in equity the vendee will have the same time to perform that is given to a mortgagor to redeem.

SPECIFIC PERFORMANCE WILL NOT BE DECREED TO ASSIST PARTY WHO HAS DELAYED payment in order to see whether the contract would prove a gaining or a losing bargain.

TENDER OF PART OF AMOUNT DUE ON CONTRACT, after four payments had become due, and two years after suit commenced for rescission, and after the property was greatly increased in value, is not sufficient ground for refusing the decree of rescission, no excuse for the delay being shown.

NO POSITIVE ACT MANIFESTING INTENTION TO RESCIND CONTRACT is necessary before filing a bill to obtain a decree of rescission, which is itself a sufficient manifestation of such intention; and if the vendee has a right to pay, he should have made or tendered payment within a reasonable time after the bill was filed.

BILL in chancery to obtain the rescission of a contract for the sale of realty between Kirby, the vendor, and Harrison, the vendee. Harrison agreed to pay the consideration of one thousand dollars, as follows: One hundred dollars down, and one hundred dollars yearly, together with the annual interest on the balance of nine hundred dollars at six per cent per annum, making nine annual installments of principal and interest, with the right to pay the whole amount due as much sooner as convenient. The taxes paid and to be paid were to be refunded to Kirby. And Kirby agreed to execute and deliver to Harrison a good and sufficient deed of the premises whenever the balance of the purchase money and yearly interest was paid, and the taxes, if any advanced by him, refunded. The second install-

ment was not paid when due, and about eight months thereafter Kirby notified Harrison by letter of that fact, and requested the payment of the same, stating the amount due. This letter was never answered. The third installment was unpaid at maturity. And some two months thereafter the complainant filed this bill. Harrison stated in his answer that he had not paid the installments when due, as he lived at a distance from Cincinnati, where the contract was made and the land was situated, and that he could not conveniently send the money, and that he had intended to visit Cincinnati and settle with the complainant about the time the suit was commenced, and that he contemplated payment in larger sums, in longer intervals than a year, or else all together in one sum; that he did visit that city, but after this suit was commenced. A general replication was filed to this answer. Harrison assigned the contract, and it passed through several hands, coming finally into the hands of Spencer. He filed a cross-bill, stating that as assignee he had tendered the complainant one thousand one hundred and forty-five dollars and demanded a deed, and upon the ground of the complainant's refusal to accept the tender or to convey, he prayed specific performance of the original agreement. And he brought the money into court. Kirby responded, denying the sufficiency of the tender and its good faith. The other facts are stated in the opinion.

James Birney, for the complainant.

Smith, Corwine and Holt, and Gholson and Miner, for the defendants.

By Court, THURMAN, J. It has been oftentimes held that time is not of the essence of a contract for the sale of real estate, unless made so by the contract of the parties. Indeed, Lord Thurlow is reported to have said, in *Gregson v. Riddle*, cited in 7 Ves. 268, that it could not be made so even by a positive stipulation in the contract. But that this *dictum* is not law is now generally, if not universally, admitted: *Lloyd v. Collett*, 4 Bro. C. C. 469; *Harrington v. Wheeler*, 4 Ves. 689; *Omerod v. Hardman*, 5 Id. 722; *Guest v. Homfray*, Id. 818; *Seton v. Slade*, 7 Id. 265; *Alley v. Deschamps*, 13 Id. 225; *Benedict v. Lynch*, 1 Johns. Ch. 374 [7 Am. Dec. 484]; *Scott v. Field*, 7 Ohio, pt. 2, 94; *Rummington v. Kelley*, Id. 101.

It is said by Judge Story that formerly courts of equity carried the doctrine that time is not of the essence of the contract beyond the true limits and to an extravagant length; but that

“the tendency of modern decisions is to bring the doctrine within such moderate bounds as seem clearly indicated by the principles of equity and by a reasonable regard to the convenience of mankind as well as to the common accidents, mistakes, infirmities, and inequalities belonging to all human transactions:” 2 Story’s Eq. Jur., sec. 780.

That this remark is fully justified by the decided cases no one who examines them will doubt. The result of the cases seems to be:

1. That time may be made of the essence of the contract by the express stipulation of the parties: See cases above cited.

2. Or, without such express agreement, by the nature of the contract itself or of the circumstances under which it was made; as where the benefit to accrue from the consideration to be paid or the conveyance to be executed materially depends upon a strict performance in point of time: *Hutcheson v. McNutt*, 1 Ohio, 18-21; *Hipwell v. Knight*, 1 You. & Col. 415; 2 Story’s Eq. Jur., sec. 776, and note.

3. Although there is no stipulation of the parties that time shall be of the essence of the contract, nor anything in the nature or circumstances of the agreement to make it so, yet it may be made essential by the proper action of a party who is not in default and is ready to perform, if the other party is in default without justification. Thus, if the vendee, without sufficient excuse, fail to pay at the stipulated time, and the vendor is in no default, and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time or he (the vendor) will consider and treat the contract as rescinded. In such case, if payment be not made within a reasonable time, the vendor has a right to treat the contract as abandoned by the vendee. In like manner and with like consequences, the vendee may notify the vendor if the latter is in default and the former is not: *Rummington v. Kelley*, 7 Ohio, pt. 2, 97; *Higby v. Whittaker*, 8 Id. 201.

4. Although there has been no such express notice, yet “where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance:” *Benedict v. Lynch*, *Hutcheson v. McNutt*, and *Rummington v. Kelley*, *supra*.

5. It is undoubtedly within the sound discretion of the chancellor to refuse to rescind a contract, the specific execution of which he would not decree; and thus leave the parties to their legal remedies: *State v. Baum*, 6 Ohio, 386. But in general, where a specific execution would be refused, a rescission will be decreed. And where the party in default "has trifled, or shown a backwardness on his part," and his default is gross, and the circumstances and value of the property have materially changed, a rescission ought to be decreed: *Hutcheson v. McNutt*, 7 Id., pt. 2, 21, 22, 25.

6. The idea that vendor and vendee stand in the mere relation of mortgagee and mortgagor, so that in equity the same time will be given to the vendee to perform that is given to a mortgagor to redeem, is contrary to reason and the whole current of modern authorities. It was distinctly repudiated in *Benedict v. Lynch* and *Rummington v. Kelley*, *supra*; and nearly every case I have cited, and a multitude of others that might be cited, are directly opposed to it. It was well said by the chancellor in *Benedict v. Lynch*, *supra*, that "the notion that seems too much to prevail, that a party may be utterly regardless of his stipulated payments, and that a court of chancery will almost at any time relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief." And we quite agree with the lord chancellor's remark in *Alley v. Deschamps*, 13 Ves. 224, that "it would be dangerous to permit the parties to lie by with a view to see whether the contract would prove a gaining or losing bargain, and according to the event, either to abandon it, or, considering the lapse of time as nothing, to claim a specific performance."

Applying the well-settled principles we have mentioned to the facts of the case before us, and it is impossible to avoid the conclusion that a specific execution ought not to be decreed against Kirby. His vendee, without even the semblance of a valid excuse, failed to pay any part of the first or second of the deferred installments, or of the taxes that became due. When written to and asked for payment, he took no notice of the letter. Being thus in default, instead of manifesting a disposition to perform his obligations as he was bound to do, he writes to a friend in Cincinnati to consult a lawyer, and learn when he can pay Kirby, and save the lot from sale. "I mean,"

says he, "the latest period of time. I can pay the money any time." Here we have his own declaration that he was able to pay at any time, and his very evident intention not to pay as long as his own interest, without regard to his duty and Kirby's rights, would permit him to remain in default. The date of this letter is March 10, 1847. On the twelfth of the same month Kirby filed his bill. Afterwards, in the same spring, Harrison, the vendee, came to Cincinnati, but neither paid nor offered to pay anything. His excuse is, that he understood Kirby had brought this suit. But this fact, instead of affording an excuse, was the most plain notice to him that his default was not acquiesced in; and that therefore, if it was not already too late, it behooved him to make payment without further delay. He chose, however, to hold on to his money and defend the suit. He seems to have preferred litigation to payment. Finally, he assigned the contract to Sehon, who subsequently assigned to Corwine, by whom it was transferred, on May 31, 1849, to the defendant Spencer, who after receiving the same, and on the same day, tendered to Kirby one thousand one hundred and forty-five dollars and demanded a conveyance, which was refused. This tender was not absolute and unqualified. It was not a tender, without condition, of so much money upon the contract; but the money was tendered as and for the sum necessary to be paid to entitle Spencer to a conveyance, and coupled with a demand for such conveyance. But it was less by nearly one hundred and eighty dollars than the sum to which Kirby would have been then entitled had he made a deed.

Now, it is to be observed that this insufficient tender, made after four installments had become due, and after Kirby had paid all the taxes and street assessments, amounting to over one hundred and fifty dollars, and after the property had more than doubled in value, and over two years after the filing of the bill, it is the only tender of payment, either in whole or in part, that has ever been made. And no excuse for the delay is shown. It is not even pretended that Kirby acquiesced in it, either actually or constructively. On the contrary, it is clear that he did not. As to the property, the only possession, if possession it can be called, ever taken by Harrison was to "step off the ground with the view of ascertaining how many buildings might be erected on it." This was on the day of his purchase. And when he visited Cincinnati, after the bill was filed, "he also went on the ground." Neither he nor his assigns have ever

made any improvements, paid any taxes, or taken any care of the property. Kirby was left to do all this, while the defendants waited and litigated, and kept their money in their pockets, until the rise in value of the property made it obvious that it would be a good speculation to pay for it and get a title. We are clear that no decree for a title should be rendered, and the cross-bill must therefore be dismissed. And we are also of opinion that this is exactly one of those cases of trifling with a contract, of backwardness, of gross default and change of circumstances, mentioned by Judge Burnett in *Hutcheson v. McNutt*, *supra*, in which not only should a specific execution of the contract be refused, but it ought to be delivered up and canceled.

It is said, however, that Kirby did no positive act manifesting an intention to rescind before filing his bill; and it is argued that this is an insurmountable objection to a decree of rescission. In support of this proposition, *Higby v. Whittaker*, 8 Ohio, 201, is cited. In that case the court did say, and very properly, in reference to the facts of the case, that "the law requires some positive act, by the party who would rescind, which shall manifest such intention, and put the opposite party on his guard, and it then gives a reasonable time to comply; but it requires eagerness, promptitude, ability, and a disposition to perform by him who would resist a rescission of his contract." The court, when this was said, were speaking of a rescission by the act of the party, and not by a decree. The case was not one of a bill to rescind. It was one in which the vendor had exercised his right to treat the contract as abandoned by the vendee, without asking a court of equity to formally decree its rescission. But here Kirby asks such a decree, and if it were admitted that he did no positive act, before filing the bill, manifesting an intention to rescind, it can not be denied that the filing of the bill itself manifests his intention clearly enough; and hence, if the vendee had a right to pay, he should have made or tendered payment within a reasonable time after the bill was filed. This was not done.

It may also be remarked that Kirby retook possession of the premises before he brought his suit.

Let a decree be entered that the cross-bill stand dismissed, that the contract be rescinded, delivered up, and canceled; that out of the money brought into court by Kirby the costs be paid, and that the residue be paid to the defendant Spencer.

TIME MAY BE MADE OF ESSENCE OF CONTRACT by express agreement or by peculiar nature and conditions of the contract: *Garretson v. Vanloon*, 54 Am. Dec. 492, and prior cases collected in the note. An extensive note discussing the subject is appended to *Jones v. Robbins*, 50 Id. 597; and in the note to *Johnson v. Evans*, Id. 675-678, the subject receives treatment.

SPECIFIC PERFORMANCE WILL BE REFUSED WHERE THERE IS NO AVERTMENT OF PERFORMANCE or offer to perform; *Garretson v. Vanloon*, 54 Am. Dec. 492, citing prior cases in the note.

REMISSION OF CONTRACTS.—This subject is discussed in the note to *Johnson v. Evans*, 50 Am. Dec. 672 et seq.; see also *Fay v. Oliver*, 49 Id. 764, and cases cited in the note; *Davis v. Smith*, 48 Id. 279.

SPECIFIC PERFORMANCE WILL NOT BE DECREED WHERE IT WOULD BE INEQUITABLE: *Trigg v. Read*, 42 Am. Dec. 447, and note; *Bryan v. Loftus*, 39 Id. 242.

LAPSE OF TIME BARS SPECIFIC PERFORMANCE WHERE TIME IS ESSENCE OF CONTRACT: *Rogers v. Saunders*, 33 Am. Dec. 635.

UNEXPLAINED DELAY AND GREAT INCREASE IN VALUE OF LAND BAR SPECIFIC PERFORMANCE: *Patterson v. Martz*, 34 Am. Dec. 474; see *Bellas v. Hays*, 9 Id. 385; but where the delay is under the consent of both parties it is granted: *Craig v. Leiper*, 24 Id. 479.

HARTFORD PROTECTION INSURANCE CO. v. HARMER.

[2 OHIO STATE, 452.]

EVIDENCE OF LOCAL CUSTOM AMONG INSURERS AS TO MATERIALITY OF UNDISCLOSED FACT respecting the risk is inadmissible in an action on a policy of insurance if not communicated to the insured, or of such general notoriety as to afford any presumption of knowledge on his part.

OPINIONS OF WITNESSES ENGAGED IN INSURANCE BUSINESS, that the fact that a building insured had shortly before the risk was taken been on fire was material to the risk, and would have influenced the judgment of a prudent underwriter, are inadmissible in an action upon the policy.

OPINIONS OF WITNESSES ARE ADMISSIBLE if the connection between the fact and its experienced consequences lies within the limits of some art or science, and the witnesses are skilled in such art or science.

EXPRESS WARRANTY IN INSURANCE POLICY IS STIPULATION INSERTED IN WRITING on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends, or it may be contained in another paper if distinctly referred to in the policy, and expressly made part of the contract between the parties; but a simple reference is not enough.

REPRESENTATION IS ORAL OR WRITTEN STATEMENT RESPECTING FACTS CONCERNING RISK, made by the assured to the underwriter before the subscription of the policy, and as a part of the preliminary proceedings which propose the contract.

ANSWERS TO QUESTIONS IN APPLICATION FOR INSURANCE NOT REQUIRED BY CONDITIONS of the policy are mere material representations, and not warranties; nor are they incorporated into the contract or made part of the

conditions upon which it is founded by being contained in a paper called a "survey," to which the policy refers in words, "For a more particular description of said premises, see survey No. 74, furnished by the insured, which is hereby made a part of this policy," nor by a condition in the policy that a survey and description shall be deemed a part of the policy and warranty on the part of the assured.

MATERIAL REPRESENTATIONS MUST BE SUBSTANTIALLY TRUE.

REPRESENTATION IN APPLICATION FOR INSURANCE THAT ASHES ARE "THROWN OUT," even if construed as a warranty, must be considered as the affirmation of a previous habit of disposing of the ashes, and leaving some of them in the building occasionally for special or extraordinary purposes, or accidentally, would not avoid the policy.

REPRESENTATION AS TO INCUMBRANCES ON PROPERTY INSURED, THOUGH UNTRUE, will not avoid the policy, if in fact written from his own knowledge by the agent of the underwriter, who was fully advised of all the facts, no fraud appearing on the part of the assured.

NO PART OF APPLICATION OR SURVEY BELONGS TO POLICY, so as to become warranty, unless it is expressly made part of it by unequivocal language appearing on the face of the policy.

IN DETERMINING MATERIALITY OF CONCEALED FACT that house insured was before the insurance on fire, caused, in the opinion of the assured, by incendiaries, the jury may be instructed to inquire for and be governed by the true cause of the fire, and not by the belief of the assured as to the cause.

ASSURED IS NOT BOUND TO COMMUNICATE HIS OWN EXPECTATIONS and opinions and speculations upon facts.

FAILURE TO DISCLOSE EVERY FACT MATERIAL TO RISK upon which information is not asked for or fraudulently suppressed will not avoid a fire insurance policy, though the rule is different in marine insurance; all that is required is, that the assured shall not misrepresent or designedly conceal any such facts, and that he answer fully and in good faith all inquiries addressed to him by the insurer, and that he do not withhold information of such unusual and extraordinary circumstances of peril to the property as could not with reasonable diligence be discovered by the insurer or reasonably anticipated by him as a foundation for specific inquiries. *Per Ranney, J.*

IT IS, IN GENERAL, SUFFICIENT IF SUBJECT-MATTER OF INSURANCE and the nature of the risk are set forth in the policy, without any representation of the nature or character of the interest for which the insurance is intended as a protection.

MERE EXPRESSIONS IN POLICY WHICH SEEM TO CONVEY ASSERTION OF EXCLUSIVE OWNERSHIP, such as "his stock of tobacco," will not avoid the policy, though it appear that the assured has only a partnership interest, for such expressions are only intended to identify and describe the property insured, and not to stipulate as to the interest of the insured.

CONDITION AGAINST KEEPING GUNPOWDER FOR SALE OR ON STORAGE upon the premises insured does not cover the case where gunpowder is merely kept upon the premises, but neither on storage nor for sale.

OBJECTIONS TO PRELIMINARY PROOFS OF LOSS ARE WAIVED if, after they are rendered by the assured, he is distinctly informed that his claim will be

determined upon the merits, and the insurer finally refuses to pay, on the ground that there is no merit in the claim.

ERROR to the district court of Belmont county. The opinion states the case.

Pennington and Cowen, and T. D. Lincoln, for the plaintiff in error.

Carrol and Shannon, for the defendant in error.

By Court, **RANNEY, J.** This suit was brought on two policies of insurance, dated and issued March 13, 1851. By the first, numbered 74, three buildings, situated in Hendrysburg, Belmont county, and a stock of goods in one of them, were insured for one year from noon of that day; and by the other, numbered 75, a lot of unmanufactured tobacco, stored in one of the buildings, was insured for four months.

Upon trial in the district court of the county, a verdict was found and judgment given for defendant in error upon both policies; to reverse which, this writ is prosecuted. The record presents an unusual number of interesting questions, arising upon exceptions taken to the rulings and opinions of that court, which have been argued here at much length and with great industry and research by counsel on both sides. As these questions relate to a contract of great importance and very general use, I shall endeavor to state, as clearly as I may be able to do, the conclusions to which the court has come—founded, as we think, upon settled principles—without attempting to canvass at length the wilderness of adjudged cases cited in argument, or the conflicting opinions of jurists and elementary writers; from which confusion, rather than certainty and precision, has very often resulted.

The assignments of error, nine in number, may be reduced to three classes: 1. It is claimed the court erred in ruling out evidence offered by counsel for the plaintiff in error, and in admitting evidence objected to by them; 2. In refusing to charge the jury upon several points as requested, and in the charge as given; 3. In refusing to grant a new trial.

I. 1. It was proved that one of the buildings insured had, shortly before the risk was taken, been on fire; and at the time was suspected, by the insured, to have been fired by an incendiary. This fact was not communicated to the agent of the company when the policy was issued, and was claimed to have been a material fact, which the insured was bound to have disclosed.

The first evidence offered and rejected consisted of the depositions of sundry witnesses engaged in the business of insurance in Belmont and other counties, to show a local usage amongst insurers doing business there to reject such applications; or, if taken, to charge a higher premium. When this evidence is carefully examined, it will be found that it did not even tend to prove a local usage differing from the general custom; and amounts to nothing more than an expression of the opinions of the witnesses that the fact not communicated was material to the risk. But assuming all that is claimed for it, we are still of opinion it was not admissible. If the fact not communicated was material, the insurer was allowed to prove it, and had the full benefit of it, to the jury. If it was not material, it could not be made so by any resolution or determination of insurance agents, the existence of which was only known to themselves, and not pretended to have been communicated to the insured, or of such general notoriety as to afford any presumption of knowledge on his part. If he is bound, at his peril, to recollect and communicate all such facts as a court and jury may afterwards think were material to the risk, it would seem to be requiring enough, without compelling him also to anticipate that others, having no such necessary relation, have been made material by those with whom he deals. The general principles of law he is taken to know; and he has a right to have the contract interpreted and enforced by them, unaffected by any local custom, unless it plainly appears that such custom was understood by the parties, and the contract made in reference to it: *Chase v. Washburn*, 1 Ohio St. 252 [*ante*, p. 623].

2. Depositions were also offered, and ruled out, containing the opinions of several witnesses engaged in the business of insurance, that this was a fact material to the risk, and would have influenced the judgment of a prudent underwriter in determining whether he should assume it or not.

It is not to be denied that some difference of opinion has obtained upon this question. In the leading case of *Carter v. Boehm*, 3 Burr. 1905, an insurance broker had testified that in his opinion certain letters ought to have been shown or the contents disclosed; and if they had, the policy would not have been underwritten. In respect to this testimony Lord Mansfield said: "Great stress had been laid upon the opinion of the broker. But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is

opinion after an event. It is opinion without the least foundation from any precedent or usage. It is opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the case; and therefore it is irrelevant and improper in the mouth of a witness."

So Gibbs, C. J., in *Durrell v. Bederley*, Holt, 285: "It is my opinion that the evidence of the underwriters who were called to give their opinion of the materiality of the rumors, and the effect they would have had upon the premium, is not admissible. It is not a question of science upon which scientific men mostly think alike; but a question of opinion, liable to be governed by fancy, and in which the diversity might be endless."

Such testimony was, however, admitted by Mr. Chief Justice Holroyd in *Berthon v. Loughman*, 2 Stark. 258; and by Lord Tenterden in *Rickards v. Murdock*, 10 Barn. & Cress. 527; but these cases were overruled by Lord Denman and his associates, in *Campbell v. Rickards*, 5 Barn. & Adol. 840, and the ruling of Lord Mansfield and Chief Justice Gibbs followed and approved.

In the case of *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 78 [22 Am. Dec. 567], the question at issue was whether the risk had been increased by the erection of a boiler-house adjoining a steam saw-mill covered by the insurance; and it was held that the opinions of witnesses were not admissible; but even if the opinions of witnesses conversant with the construction and management of such mills were admissible in evidence, yet that persons who had no other knowledge of the subject than that derived from their business as insurers could not be allowed either to say what they thought on this point, or whether they would have insured the mill at the same premium after the boiler-house was erected as before.

In this conflict of opinion there is no resource left but to return to the principle upon which such evidence is ever received. The general rule certainly is, that facts only can be given in evidence, and the necessary and natural deduction from them must be made by the jury. In everything pertaining to the ordinary and common knowledge of mankind, jurors are supposed to be competent, and indeed peculiarly qualified, to determine the experienced connection between cause and effect, and to draw the proper conclusion from the facts before them. But they are selected with no view to their knowledge of particular services, trades, and professions requiring a course of previous study and preparation. As questions connected with these will

very often arise, and as the law deprives the jury of no reliable means for ascertaining the truth, it allows them to be aided, in making the proper application, by the opinions of witnesses possessing peculiar skill in those particular departments. But this is only permitted where the nature of the question at issue is such that the jury are incompetent to draw their own conclusions from the facts, without the aid of persons whose skill or knowledge is superior to their own, and such as inexperienced persons are unlikely to prove capable of forming a correct judgment upon without such assistance: *Fish v. Dodge*, 4 Denio, 311 [47 Am. Dec. 254].

The general rule and the exception are alike applicable to every possible class of cases; and whether the one or the other shall be applied—whether the jury should be left to make the proper deduction from each fact proved, or may be aided by the opinions of experts—must in every case depend upon the nature of the question involved. If the connection between the fact and its experienced consequences belongs to the ordinary information of men, the general rule must govern; if not, and it lies within the limits of some art or science, the exception applies, and it may be proved by the opinions of persons skilled in it. The application of the doctrine to cases of insurance is as obvious and easy as to any other. A fact concealed or not communicated is claimed to have been material to the risk assumed; because, from its probable or necessary results, it increased the chances of loss. The question is, Did it so increase them? If the answer can be given from ordinary experience and knowledge, the jury must respond to it unaided; if the effects of such a cause are only known to persons of skill, and are to be determined only by the application of some principle of science or art, such persons may give the results of their own investigation and experience to the jury in the way of opinions, the better to enable them to come to a correct conclusion.

In cases of life and marine insurance, such testimony may often become indispensable. If the fact concealed were some bodily infirmity or some alleged defect in a ship, it must certainly be competent to allow physicians to state their opinions whether the infirmity was calculated to shorten the life of the insured in the one case, or experienced mariners or ship-carpenters whether the defect was such as to endanger the ship in the other. But to call upon an insurance broker, or lawyer, merchant, or clerk, acting as the agent or officer of some insurance company, and ignorant of the very first principles of medi-

cine or navigation, for either purpose, would seem to me altogether inadmissible, however well acquainted he might be with the details of his own particular business.

In cases of fire insurance, it is more difficult to see when a necessity for such evidence could ever arise; but I am not prepared to say that it might not; and if it did, no doubt it should be governed by the same principles.

It is therefore impossible to say that the opinions of witnesses are never to be received in determining the materiality of facts not disclosed; much less can it be said that they are to be received in all cases. In each case it must depend upon the nature of the inquiry; and as the question relates to the admissibility of the evidence, must be determined by the court with reference to the distinction we have endeavored to indicate. This distinction Mr. Smith in his learned note to *Carter v. Boehm*, 1 Smith's Lead. Cas. 283, thinks will reconcile all the English cases, and it is the one adopted by some of the elementary writers: 1 Greenl. Ev., sec. 441; 2 Phill. on Ins. 653, sec. 8.

There was nothing in the question raised here requiring either science or skill to determine. The effect that a previous fire might have upon the safety of the building thereafter could be as well understood by one man as another. Every man of sense would know that it would depend entirely upon the cause of the fire. If the building had been fired by an undiscovered incendiary, it might be reasonably inferred that the motive which prompted the act might lead to a repetition of the attempt; but if it had been ignited by a stroke of lightning or a spark from a burning building, or any other temporary or accidental cause, which no longer continued, nobody in his senses would suppose the building in greater peril from the fact in the future. The jury were entirely competent to draw their own conclusions, and the evidence was therefore inadmissible and properly rejected.

3. It is also assigned for error that the court erred in rejecting the policy of the Portage Mutual Insurance Company, and the deposition of David McCartney, designed to show a previous insurance upon the property not notified to the agent of this company. But as this assignment has not been noticed in the argument, I shall not notice it here, further than to say we are satisfied the ruling of the court was correct.

It is next claimed that the court erred in admitting the testimony of the agent to prove that he knew of the existence of a

certain incumbrance upon the property at the time he issued the policies. As the correctness of this must depend upon the view of the law taken in the charge to the jury, we shall not attempt to consider it in this connection, but pass on to that branch of the case.

II. Policy No. 74 was issued upon a written application, drawn up by the agent of the company, and signed by the defendant in error, by his agent Wilson James. We make no question that it was the paper of the defendant, and that he is legally responsible for its contents. This paper is headed "Survey." ("To be signed by the applicant.") The balance of it consists of questions and answers, thirteen in number, most of them having relation to the character of the structures, materials of which they are composed, distance from other buildings, etc. The eighth and thirteenth are as follows: "Ashes. How are they disposed of?" Answer: "Thrown out." "What incumbrance, if any, is now on said property?" Answer: "None; attachment on goods released by bond." In relation to the ashes, the evidence tended to prove that for some time before the policy was underwritten some of the ashes had been taken by the family of the defendant's clerk, who occupied the store building, and placed in a box in the kitchen, for the purpose of breaking water to wash with, and what was not wanted for this purpose was thrown out; that the uniform practice had been to wet them thoroughly when they were placed in the box for this purpose, until the evening before the fire to which allusion has been made, when some were put in it by his wife, who forgot to wet them, and in the night the box was found to be on fire, and some part of the wood-work of the room adjacent to it.

As to incumbrances, it was proved that the goods and lots upon which the buildings were situated had been taken by a writ of attachment at the suit of a creditor, the agent of the company acting as one of the attorneys, which was pending at the time the policy was underwritten; the goods having been previously released by bond, but the lien still remaining upon the lots. The agent testified "that he knew of the existence of the said proceeding in attachment at the time said survey was made out, and made the entry, 'attachment on goods released by bond,' from his own knowledge; that at the time he did not think of the fact that the attachment on the lots was still existing and not released, or he would have entered it, or have communicated the fact to James, and with his consent have entered it."

Following a general reference to the property insured, on the face of the policy, the following language is used: "For a more particular description of said premises, see survey No. 74, furnished by the insured, which is hereby made a part of this policy." It is also declared "that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein specially provided for." The first, fourth, and seventeenth conditions are as follows:

First condition: "Applications for insurance should be in writing, and specify the construction and materials of the building to be insured or containing the property to be insured; by whom occupied; whether as a private dwelling, or how otherwise; its situation with respect to contiguous buildings, and their construction and materials; and whether any manufactory is carried on within or about it, and in relation to insurance on goods," etc.

Fourth condition: "A false description, by the assured, of a building or of its contents * * * shall render absolutely void a policy issued upon such description. But the office will be responsible for surveys and valuations made by its agents."

Seventeenth condition: "When a policy is made and issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy, and warranty on the part of the assured."

Upon this state of the facts, counsel for the plaintiff in error contended that the eighth and thirteenth questions and answers constituted a part of the contract between the parties, and warranty on the part of the assured. That the answers were not true, and therefore the policy had never attached, and was void. But the court instructed the jury, in substance, that only so much of the written application as related to the situation and description of the property insured was by the policy made warranty; and that the answers to the questions referred to were to be treated as representations, which the parties had made material, and therefore their materiality was not a question for the jury. That if the representation as to the ashes was substantially untrue, if the habit was to deposit the ashes in the building insured, the policy was void, whether the representation was made intentionally or by mistake, and whether the applicant knew what was done with the ashes or not; but if the ashes were generally and usually thrown out, and only de-

posited in the building occasionally and for special or extraordinary purposes, or accidentally, it would not avoid the policy. That the attachment proceedings showed an incumbrance on the buildings insured; but if the agent of the company, at the time he issued the policy, knew of the existence of this incumbrance, then the policy was not, on that account, void, for he was not misled by it.

In respect to the alleged concealment of the previous fire, the jury was instructed that its materiality was a question exclusively for them, in determining which it was proper to consider the true cause of the fire, and not the belief of Harmer as to the cause; and if they were satisfied it was material, and not communicated or known to the agent of the underwriter at the time the policy was issued, the policy was void, whether the concealment resulted from fraud, accident, or mistake.

At the hazard of incurring the imputation of prolixity, I have thus stated at length the view of the court below, with the facts to which they were applied, in order that our own may be the more clearly understood. They involve, as will be seen, the doctrines of warranty, misrepresentation, and concealment, as applied in the law of insurance. The consequences of each, in marine insurance, may be regarded as well settled by the great current of authority. Every undertaking of the assured in the body of the policy amounting to a warranty, whether material to the risk or not, must be strictly and literally true; and every representation of a material fact which might have influenced the judgment of the underwriter in assuming the risk must be substantially true. For the same reason, the assured is bound to communicate every material fact within his knowledge not known or presumed to be known to the underwriter, whether inquired for or not; and a failure in either particular, although it might have arisen from mistake, accident, or forgetfulness, is attended with the rigorous consequences that the policy never attaches, and is void; for the reason that the risk assumed is not the one intended to be assumed by the parties. Much of this doctrine is peculiar to this contract. In other contracts, it is enough that warranties even are substantially performed; and they can not, in general, be impeached for misrepresentation or concealment unless fraud was intended.

Fire insurance sprung up at a later period; and the courts, finding a system of rules already constructed for marine risks, at once transferred them to this new species of insurance.

Almost all the diversity of opinion to be found in the later

cases has resulted from a growing conviction with most courts that a substantial difference exists in the nature and essential elements of the contract of marine and fire insurance, which renders some of these rules inapplicable to the latter, and from a disinclination with others to depart from the strict rules applied to marine insurance.

1. The distinction between a warranty and a representation is easily comprehended; the difficulty only arises in its application to particular cases. An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends: Angell on Ins. 169, sec. 140; 1 Arnould on Ins. 577; *Duncan v. Sun F. Ins. Co.*, 6 Wend. 488 [22 Am. Dec. 539]; *Rogers v. Niagara Ins. Co.*, 2 Hall, 100.

It is, however, considered to be on the face of the policy, although contained in another paper, if distinctly referred to in it, and expressly made part of the contract between the parties: 3 Kent's Com. 450; *Fowler v. Aetna etc. Ins. Co.*, 7 Wend. 270; *Burrill v. Saratoga etc. F. Ins. Co.*, 5 Hill, 188 [40 Am. Dec. 345]; *Trench v. Chenango etc. Ins. Co.*, 7 Id. 122. A simple reference is not enough. As stated by Bronson, J., in *Burrill v. Saratoga etc. Ins. Co.*, *supra*: "An express warranty is always a part of the contract, and a reference in the policy to a survey or other paper will not make such a paper a part of the contract so as to change what would otherwise be a mere representation into a warranty."

Mr. Arnold thus defines a representation: "A verbal or written statement made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise have formed of it:" 1 Arnold on Ins. 489.

Angell says: "There is no difficulty in distinguishing a representation from a warranty; the former being a part of the preliminary proceedings which propose a contract, and the latter a part of the contract as it has been completed; a misrepresentation renders the contract void on the ground of fraud; a non-compliance with a warranty is an express breach of the contract:" Angell on Ins., sec. 147. The one may induce an error in regard to the subject of the contract, and the other is a stipulation of the contract itself: 2 Duer on Ins. 751; *Hazard v. New England Mar. Ins. Co.*, 8 Pet. 557.

But it is by no means as clear as is assumed by the plaintiff's

counsel that what is in its nature preliminary, and designed for the information of the underwriter, will so change its character as not to be satisfied by a substantial compliance; from the fact that it is, by appropriate words in the policy, made a part of it. Nor is it by any means certain that the distinction taken by the district court was not altogether immaterial. If the whole of the application is incorporated into the policy, it is done by the written clause referring to it for a more particular description, which does not declare the effect of making it a part of the contract. There is nothing in the printed conditions annexed to the policy requiring the applicant to state how the ashes are disposed of, or the state of the title; and it is manifest they both belong appropriately to the preliminary information which the underwriter has a right to require to guide his judgment, and are not so connected with his undertaking as necessarily to constitute conditions upon which the contract is founded. The conditions certainly must be construed together, and the warranty provided for in the seventeenth can not be made more extensive, or cover more particulars, than are required to be inserted in the application by the first. In *Houghton v. Manufacturers' Ins. Co.*, 8 Met. 114 [41 Am. Dec. 489], the application and representations were held to be legally adopted and embodied in the contract as fully and to the same effect as if they had been recited and set forth at large in the policy. And yet the court held that they were to be regarded as having the legal effect of representations rather than warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both; that they were like representations in requiring that the facts stated should be substantially complied with, but not like warranties in requiring an exact and literal compliance.

In *Farmers' Insurance and Loan Company v. Snyder*, 16 Wend. 481 [30 Am. Dec. 118], the application and survey were adjudged to be a part of the contract; but the chancellor, in delivering the opinion of the court of errors, after adverting to the marine rule, said: "I have doubts whether the principle of construing every matter of mere description contained in the body of the policy, although not material to the risk, into an express warranty, which is to be literally complied with, should be applied with the same strictness to fire policies." And in *Alston v. Mechanics' Insurance Co.*, 4 Hill, 330, he arrived at the conclusion that it was sufficient that they were substantially and materially true.

In the late case of *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 32 [54 Am. Dec. 309], the court of errors say: "We are by no means confident that representations in surveys, preceding the issuing of fire policies, extending as they do to the present and future condition of the property about to be insured, have been considered as technical warranties, to be true to the letter, for a long series of years, and not rather as representations, to be, at the time and thereafter, substantially exact and true. Nor are we certain that a mere reference to these representations made in the body of the policy, in order to explain the rights and obligations of the parties, does necessarily change their character from representations to warranties." "If this vital change in what is only preliminary is to be brought about by a mere reference in the body of the policy to the survey, then there is a principle of the law of marine insurance being applied to policies of a different character, which must ere long present questions of unusual interest and importance." "This would be a very broad principle of law, of great importance, demanding mature and careful consideration before we sanction it, and one which we are not called upon to decide in this case."

But suppose the answers to these questions to be construed as warranties; still the law was laid down as favorably to the plaintiff in error as some courts and judges of the highest respectability would require. To give the statement as to the ashes any application to the facts in evidence, it must be regarded as affirming the previous habit of disposing of them. If construed as imposing an obligation in the future only, it was not pretended it had been violated. The jury was told if the habit had been otherwise than to throw them out, the policy was void; although leaving some of them in the building occasionally for special or extraordinary purposes, or accidentally, would not have that effect. Now, wherever a strict and literal compliance with the terms of warranties has been held necessary, no artificial rule has been applied in arriving at the meaning of the parties: Angell on Ins., sec. 155. In *Shaw v. Roberts*, 6 Ad. & El. 75, one of the conditions of insurance was, that the building (a barn) should not "be made use of to stow or warehouse any hazardous goods." Lord Tenterden, C. J., held that this must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods; and not their occasional introduction for a temporary purpose connected with the occupation of the premises. And he instructed the jury that the introduction of a tar-barrel, for the purpose of

repairing the building, was no breach of the condition, notwithstanding it led to its destruction. This doctrine was again applied by the same learned judge to a similar state of facts in *Dobson v. Soltherby*, Moo. & M. 90, with the remark, that if the company intended to stipulate, not merely that no fire or hazardous goods should be habitually kept on the premises, but that none should be ever introduced upon them, they might have expressed themselves to that effect; and to the same purpose is the ruling of Chief Justice Tindal in *Pim v. Reid*, 6 Man. & G. 1.

The statement as to incumbrances was certainly untrue; but the agent of the underwriter was fully advised of all the facts, wrote the answer from his own knowledge, and would have stated it truly, if the truth had occurred to him at the moment, without making the slightest difference in the terms of his insurance; while it does not appear that the agent of the assured knew anything about it. It is not doubted that this would be a perfect answer to a clause of warranty introduced into any contract, although it might be in writing: *Schuyler v. Russ*, 2 Cai. 202; Long on Sales, 202.

But it is claimed that a stipulation introduced into a contract of insurance can not be so restrained, and that parol evidence is not admissible to show such a state of facts. Many cases may be found to support the position; but those judges who have gone furthest and applied it with most rigor have been compelled to admit that no satisfactory reason can be assigned for the distinction: *Jennings v. Chenango etc. Ins. Co.*, 2 Denio, 79, per Jewett, J. On the other hand, Nelson, C. J., in *Turley v. North American Ins. Co.*, 25 Wend. 374, in speaking of the contract of insurance, expresses the opinion that "there is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it for the purpose of guarding the company against fraud or imposition; beyond this we would be sacrificing substance to form—following words rather than ideas." Stephens in his *Nisi Prius*, vol. 3, p. 2081, upon the authority of *Newcastle Ins. Co. v. Macmorran*, 3 Dow, 255, says: "It seems that even in case of warranty, it would be a good answer that the mistake or misrepresentation was to be attributed solely to the insurers themselves or their agent." And finally, the supreme court of Pennsylvania, in the case of *Bruner v. Howard Fire Ins. Co.*, 2 Am. Law Reg. 510, determined during the present year and not yet reported, has decided that parol evidence is admissible to show

that the description of property insured annexed to a policy, though signed by the insured, was drawn up by the agents of the insurer; that they knew all about the property from verbal description by the insured and from actual survey; and that therefore omissions and errors therein were those of such agents and not of the insured—notwithstanding a provision in the policy that the description should be taken as a part thereof, and as a warranty on the part of the insured.”

I have thus stated enough to induce a doubt, at least, whether the very confident assertion of counsel, that all the stipulations of the contract on the part of the assured are to be deemed warranties, requiring literal performace, and not in any way to be affected by parol evidence, is universally acquiesced in by the courts of other states. It does not, however, in this case, become necessary to decide any of these questions, or to express a decided opinion upon them; as we are of opinion the answers in question were not incorporated into the contract or made part of the conditions upon which it was founded. When these questions properly arise, it will undoubtedly be worthy of serious consideration whether the general principles of law, as applied to other contracts, are not altogether sufficient to protect the rights and interests of both the parties in this; and whether justice is best promoted in allowing either party to escape from its obligations for causes other than those that might have affected his interests.

2. No part of the application or survey, it is perfectly settled, belongs to the contract, unless it is expressly made part of it, by unequivocal language appearing on the face of the policy. “A warranty is never created by construction. It must either appear in express terms, affirmative or promissory, or must necessarily result from the nature of the contract:” *Savage, J., in Jefferson Ins. Co. v. Cotheal*, 7 Wend. 80 [22 Am. Dec. 567]; *Snyder v. Farmers’ Ins. and Loan Co.*, 13 Id. 92; *Kentucky etc. Ins. Co. v. Southard*, 8 B. Mon. 634.

Every part of the policy must be considered, and such a construction put upon it as will harmonize and give effect to all its provisions. The conditions annexed are undeniably a part of this policy, and are inserted “to explain the rights and obligations of the parties.” By the first of these, the applicant is required to state the construction and materials of his building, by whom it is occupied, whether as a private dwelling or otherwise, its situation in respect to contiguous buildings, and whether any manufactory is carried on in or about it; and this

is all that he is required to state; and it all belongs to a description of the premises, such as the agents of the company, or any one else, could make on actual view; and constitutes, both in the legal and ordinary sense, a survey of them.

By the fourth condition the company say to the applicant, If you make this "description," and it is false, your policy is void; but if our agents make it, we will be responsible for its correctness; and by the seventeenth, the applicant consents that this "survey and description" shall be a part of the policy; and if made by him, that he will warrant its truth. In all this, there is no complaint that it was not true. But other matters, not required to be stated by anything contained in the policy or the conditions annexed, or descriptive of the premises, were inserted upon the paper headed "Survey;" and the truth of these, also, is claimed to be warranted. And why? Simply because it is referred to "for a more particular description of the premises," and for that purpose alone made part of the policy. It is now sought to extend it beyond the declared purpose, and make it effective to incorporate additional stipulations into the contract. This we think altogether inadmissible, and unsupported by any authority whatever. In the case of *Trench v. Chenango etc. Ins. Co.*, 7 Hill, 122, the policy contained this clause: "Reference being had to the said J. & T. Trench, for a more particular description, and the conditions annexed, as forming part of this policy." The court held the annexed conditions a part of the contract, but the application not. They say: "That is referred to for the mere purpose of describing and identifying the property insured, and not to incorporate its statements into the policy as parts thereof."

In this connection, the case of *Jennings v. Chenango etc. Ins. Co.*, 2 Denio, 75, is very much pressed upon our attention, as containing an able exposition of this branch of the law, as acknowledged and enforced by the courts of New York. The opinion of Judge Jewett is certainly distinguished for perspicuity, and the case for an application of the severest rules of marine insurance to a fire policy, operating so harshly as to compel the judge to "doubt whether the intentions of the parties and the interests of justice were duly regarded in the establishment of the rule, that matters of mere description should in this class of contracts be considered an express warranty, without regard to their materiality in respect to the risk." But that the opinion throughout is concurred in by the courts of that state I have very good reason to doubt. It was certainly questioned by Jones,

J., in delivering the opinion of the court of appeals in *Gates v. Madison etc. Ins. Co.*, 2 N. Y. 43; and if it was not entirely overruled by his own opinion, upon this last case again coming up, 5 Id. 469 [55 Am. Dec. 360], it was saved upon a distinction too subtle, I must think, for practical purposes. But if received in its full extent, it contains nothing opposed to our conclusion. The misstatements in that case related to the situation of the building in respect to other buildings, and to the purpose for which it was occupied; both of which were required to be truly stated by the conditions annexed, and made part of the policy; and the consequence of a failure was declared to be a forfeiture of all rights under it; while in this case, the conditions annexed require no statement as to the disposal of the ashes or the state of the title; and the clauses of forfeiture and of warranty extend only to those particulars of "survey and description" which are required to be set forth in the application. In that case the court say "the mistake was proved to have been the consequence either of the ignorance, carelessness, or bad faith of the agent of the defendants;" and yet they would not allow this fact to restrain those provisions of the policy, or to be shown by parol evidence. In this, the case is directly at issue with the decision of the supreme court of Pennsylvania to which I have referred; but we have not found it necessary to decide the question.

If the answers in this case are to be treated as representations, it is not denied that the evidence was admissible to rebut the presumption of fraud, or misleading, which might otherwise arise; and it can not be doubted that it most effectually did it. A very different question might be presented upon policies issued by mutual insurance companies, restrained by charter provisions and by-laws, to which the assured is deemed to be a party, and where the premium is secured upon the property: *Philips v. Knox etc. Ins. Co.*, 20 Ohio, 174.

3. The charge as to the concealment of the previous fire is also objected to, because it directed the jury, in determining the materiality of the fact, to inquire for and be governed by the true cause of the fire, and not the belief of Harmer as to the cause. So far as his belief was of any value as an admission of the true cause, it went to the jury for what it was worth, and the company had the full benefit of it; and if his belief corresponded with the true cause, of course no injury was done them. If it did not, of what importance was his belief or suspicion to them? Before the duty of disclosure arises, the fact must be material to the risk; that is, it must increase the chances of loss. If it

was not in truth material, could his erroneous suspicions make it so? It was not pretended that he knew the cause, or had received any information, either true or false, which he failed to communicate. Under such circumstances, the marine rule is, that "the assured is not bound to communicate his own expectations and opinions, and speculations upon facts:" 1 Phill. on Ins. 315. The balance of the instruction upon the subject of concealment is not complained of; but although not necessary to the decision of the case, I can not let it pass without expressing my decided conviction that the law was laid down too favorably to the underwriter and too strongly against the assured.

It is not now true, whatever may be thought of the older authorities, that there is no difference in this respect between marine and fire insurance; nor that a failure to disclose every fact material to the risk, upon which information is not asked for, or suppressed with a fraudulent intent, will avoid a policy of the latter description. The reason of the rule, and the policy in which it was founded, in its application to marine risks, entirely fail when applied to fire policies. In the former, the subject of insurance is generally beyond the reach and not open to the inspection of the underwriter, often in distinct ports or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter, it is or may be seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards as well appreciated by the underwriter as the owner. In marine insurance, the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has therefore the right to exact a full disclosure of all the facts known to him which may in any way affect the risk to be assumed. But in fire insurance, no such necessity for reliance exists, and if the underwriter assumes the risk without taking the trouble to either examine or inquire, he can not very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities. Mr. Angell says: "The strictness and nicety required in questions arising on policies of marine insurance are not, to their full extent, applicable to policies of fire insurance; the former being entered into by the underwriter almost exclusively on the statements and information given by the assured himself; in the latter, the underwriters assume the risk on the knowledge ac-

quired by an actual survey and examination made by themselves, and not on representations coming from the assured:" Angell on Ins. 209. In *Burritt v. Saratoga etc. Ins. Co.* 5 Hill, 188 [40 Am. Dec. 345], Bronson, J., after stating the rule applied to marine policies, says: "This doctrine can not be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk."

In *Clark v. Manufacturers' Ins. Co.*, 8 How. 235, the insurance was upon a cotton factory, and one question was as to the use of lamps in the picker-room. The supreme court of the United States held that "if no representations were made or asked, it would not be the duty of the insured to make known the fact that lamps were used in the picker-room, although the risk might have been thereby increased, unless the use of them in that way was unusual." Justice Woodbury, in delivering the opinion of the court, says: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must be supposed to assume them; and if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak." And finally, the court of appeals in New York, in the case of *Gates v. Madison etc. Ins. Co.*, 5 N. Y. 469 [55 Am. Dec. 360], Judge Jewett delivering the opinion, has held that in the absence of special provisions in the policy relating to the disclosure of facts material to the risk, all that is required of the insured is, that he shall not misrepresent or designedly conceal any such facts, and that he answer fully and in good faith all inquiries addressed to him by the insurer.

This, I confess, seems to me the true rule; perhaps with the qualifications more distinctly indicated by the supreme court of the United States, that the insured does not withhold information of such unusual and extraordinary circumstances of peril to the property as could not with reasonable diligence be discovered by the insurer, or reasonably anticipated by him as a foundation for specific inquiries. As this is not necessary to the decision of the case, I express it but as my own opinion, and I am led to do so from being now satisfied that I expressed an erroneous opinion at the circuit, by adhering too closely to the

doctrine of marine insurance, in a point where the reason of that rule does apply: See also *Holmes v. Charlestown Ins. Co.*, 10 Met. 211, 214 [43 Am. Dec. 428]; *Satterthwaite v. Mutual Benefit Ins. Ass.*, 14 Pa. St. 393; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 419.

4. The tobacco covered by policy No. 75 was claimed to have been owned by the plaintiff below and one Rowly, in partnership; and the jury were charged that although they should find such to have been the fact, the plaintiff would nevertheless be entitled to recover the value of his interest in the tobacco burned, not exceeding the amount insured. This charge is objected to, although it is admitted the decided weight of authority is, that the nature or amount of the interest held by the assured in the property at risk, in the absence of specific inquiries, need not be communicated to the insurer. Such is not only the weight of authority, but I know not where it has ever been doubted, except in the case of *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25.

It is "abundantly well settled that an insurance effected against loss by fire will entitle the assured, in case of loss, to recover, upon the proof of any interest in the subject-matter insured, however indirect; and it is, in general, sufficient if the subject-matter of the insurance and the nature of the risk are set forth in the policy, without any representation of the nature or character of the interest for which the insurance is intended as a protection:" Angell on Ins. 218, sec. 182; 1 Phill. on Ins. 354; *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40 [20 Am. Dec. 507]; *Fletcher v. Commonwealth Ins. Co.*, 18 Id. 419; *Tyler v. Aetna Ins. Co.*, 12 Wend. 507; *Smith v. Bowditch*, 6 Cush. 448; *Turner v. Burrows*, 5 Wend. 546; *Locke v. North American Ins. Co.*, 13 Mass. 61. But it is said he is represented as the sole owner in the policy. The expression is, "his stock of tobacco."

If the cases I have cited are examined, it will be found that the assertion of exclusive ownership in many of them is much more positive than in this; and yet in no one of them was this objection allowed to prevail. They all seem to proceed upon the principle, equally applicable here, that such expressions are only intended to identify and describe the property insured, and not to furnish information, or stipulate as to the state of the title or interest of the assured. We see no error in the charge upon this point.

III. Did the court err in overruling the motion for a new trial? So far as the reasons in support of this motion relate to

the ruling of the court in receiving or rejecting testimony, and in the charge to the jury, they have already been disposed of. It is claimed, however, that the verdict is not supported by the evidence: that the fire of the morning before was a material fact; that the ashes were not generally and usually thrown out; that gunpowder was kept upon the premises for sale, in violation of the eighth condition annexed to the policy; and that the preliminary proofs were defective.

Upon all these points we are not only satisfied that the verdict is not decidedly against the weight of evidence, but think it well supported by it. That the previous fire arose from depositing the ashes in the box is perfectly manifest; and equally so that it was not a continuing cause of danger; and we can not think that the use of a few of the ashes for a domestic purpose connected with the occupancy of the building was a substantial variance from the answer given to the question upon that subject. That it would not be so considered by the English courts, even in case of warranty, is obvious from the cases to which I have alluded; to which may be added the case of *Gates v. Madison etc. Ins. Co.*, 5 N. Y. 479 [55 Am Dec. 360], to the same purpose. The eighth condition attached to the policy provides that "the keeping of gunpowder, for sale or on storage, upon or in the premises insured, without written permission in the policy, shall render it void." It was proved that a small quantity of gunpowder belonging to Harmer was in the store, and for sale, before the policy issued, and remained there until the building was destroyed; but none, after that time, had been sold or offered for sale. This provision operated only in the future. That the powder was not on storage is not only admitted, but has been judicially determined in *New York Equitable Ins. Co. v. Langdon*, 6 Wend. 623. Was it for sale? The jury certainly had no evidence that it was. Keeping powder upon the premises is one thing; and keeping it for sale quite another, and much more hazardous. If the company intended to stipulate against the former, they should have expressed themselves to that effect. They have not done so, and we can not incorporate it for them.

The objections to the preliminary proofs were taken for the first time upon the motion for new trial. The very unusual number of questions presented, many of them arising for the first time in this court, has already extended this opinion to such length as to preclude my noticing these objections in detail. Nor is it necessary. Whatever of merit there might have

been in them, if the assured had been apprised of the nature of the objections, and an opportunity given him to supply the defects, we think they have been waived by the company. After they were rendered he was distinctly informed that his claim would be determined upon the merits, and the ultimate refusal to pay, after months had elapsed, was placed upon the ground that there was no merit in it. Under such circumstances, the preliminary proof can not be objected to: *O'Niel v. Buffalo Fire Ins. Co.*, 3 N. Y. 122; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390; *Francis v. Ocean Ins. Co.*, 6 Cow. 404; *Ætna Ins. Co. v. Tyler*, 16 Wend. 402 [30 Am. Dec. 90].

Upon the whole case, therefore, we can see no substantial reason why the plaintiff below should not have recovered. It was certainly extraordinary, and well calculated to excite inquiry and perhaps suspicion, that the building should have been twice on fire within twenty-four hours, and the insurance effected between the fires; but the evidence removes all suspicion from the assured on account of either of them. The first was a pure accident, originating in forgetfulness; and the last was caused by the burning of a steam saw-mill in the vicinity, with which he had no concern. We have been very earnestly pressed with the importance of making our decisions upon questions of insurance conform to those in other states; and the opinion is expressed that the questions involved in this case "lie at the foundation of any insurance, except at extravagant rates." We know of no conflict between the decision we make and any that has been made elsewhere. But the argument assumes a uniformity in other states that does not exist. Upon some questions we could not follow them all, if we made the attempt. We choose rather to read and consider the reasons that may be advanced by other courts, with deference to their superior wisdom and learning, and in the end be governed by what we consider sound principles and substantial justice. I have no idea that the doctrine to which I have given my individual approval is opposed to the true interests of honest underwriters. If it requires of them more vigilance and care before risks are assumed, it relieves them in the same proportion from the consequences of ill-advised undertakings, which always make a large item in their losses. But whether profitable to them or not can make no difference, if it is founded in good reason and sound policy. While I would go as far as any case has ever gone to protect them from fraud and imposition, and would hold the assured to the strictest accountability where confidence was necessarily re-

posed in him, I have no hesitation in saying, if the shrewd and intelligent are only to obtain insurance at low rates, by allowing underwriters to deprive others of the indemnity upon which they have honestly relied, upon technicalities or their own negligence, that the sacrifice demanded is much greater than the object to be attained.

We are all of opinion that the judgment of the district court should be affirmed.

FAILURE OF ASSURED TO DISCLOSE MATERIAL FACTS, EFFECT OF: See *Smith v. Columbia Ins. Co.*, 55 Am. Dec. 546, and note citing prior cases 550; *Gates v. Madison etc. Ins. Co.*, Id. 360, and note.

DISTINCTION BETWEEN WARRANTY AND REPRESENTATION IN POLICY: *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Am. Dec. 309, and note citing the prior cases 320; *Jones Mfg. Co. v. Mfg. M. F. I. Co.*, Id. 742; *Daniels v. Hudson etc. Ins. Co.*, 59 Id. 192.

REPRESENTATIONS IN APPLICATION OR SURVEY ARE NOT WARRANTIES UNLESS MADE SO BY CONDITION IN POLICY: *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Am. Dec. 309; *Burritt v. Saratoga etc. Ins. Co.*, 40 Id. 345, and note. But see *Frost v. Saratoga etc. Ins. Co.*, 49 Id. 234. In *Byers v. Insurance Co.*, 35 Ohio St. 606, 619, the principal case was distinguished, and it was held that where the application is expressly made the basis of the contract, it will be effective as a warranty.

OBJECTIONS TO PRELIMINARY PROOFS OF LOSS waived by objecting to claim on some other ground: *Clark v. N. E. Mut. Fire Ins. Co.*, 53 Am. Dec. 44; *St. Louis Ins. Co. v. Kyle*, 49 Id. 74, and note citing prior cases. The principal case is cited to the point that a failure to object to sufficiency of proofs of loss is a waiver of defects therein, in *Insurance Co. v. Parisot*, 35 Ohio St. 35, 42; *Peoria etc. Ins. Co. v. Lewis*, 18 Ill. 560.

OPINIONS OF WITNESSES WHEN RECEIVABLE IN EVIDENCE: *Luning v. State*, 52 Am. Dec. 153; *Donnell v. Jones*, 48 Id. 73, and note citing prior cases; *Sikes v. Paine*, 51 Id. 389, and note; note to *Nelms v. State*, 53 Id. 101, citing prior cases. See also *Daniels v. Hudson etc. Ins. Co.*, 59 Id. 192. The principal case is cited to the point that opinions of witnesses are not admissible upon subjects of common knowledge, in *Luce v. Dorchester Ins. Co.*, 105 Mass. 302.

MISREPRESENTATIONS OF INTEREST OF INSURED WILL NOT AVOID policy when parties understood each other at the time: *Bell v. Western Marine & Fire Ins. Co.*, 39 Am. Dec. 542; see *Morrison's Adm'r v. Tennessee etc. Ins. Co.*, 59 Id. 299; *Daniels v. Hudson etc. Ins. Co.*, Id. 192. But a misrepresentation that insured property is not incumbered, in answer to a direct interrogatory, renders policy void: *Clark v. N. E. Mut. Fire Ins. Co.*, 53 Id. 44.

PARTICULAR CUSTOM OF INSURERS NOT SHOWN TO HAVE BEEN KNOWN TO ASSURED can not be proved. The principal case is cited to this point in *Luce v. Dorchester Ins. Co.*, 105 Mass. 302. On the other hand, underwriters are bound to know the usages of the insurance trade in favor of the assured: *Cox v. Charleston etc. Ins. Co.*, 45 Am. Dec. 771, and note citing prior cases. But where the terms of the contract are plain, evidence of usage is not admissible to vary it: See *Glendale Woolen Co. v. Protection Ins. Co.*, 54 Id. 309, and cases cited in the note.

MISSTATEMENT IS NOT AVAILABLE WHERE APPLICATION IS PREPARED BY AGENT OF INSURER. The principal case is cited in *Miner v. Phoenix Ins. Co.*, 27 Wis. 701; *Roth v. City Ins. Co.*, 6 McLean, 340, to the point that insurance companies can not avail themselves of any misstatement or omission in the application constituting a warranty on the part of the assured where such application is prepared by the agent with knowledge of the facts, or he is intrusted by the assured to make the application. In *Harris v. Columbiana etc. Ins. Co.*, 51 Am. Dec. 448, it is held that an application for a policy may be reformed so as to make it conform to the representation of facts made to the insurer's agent, if the insured was misled into signing an application containing a wrong statement by the action of the agent.

DAMAGE CAUSED BY EXPLOSION OF GUNPOWDER IS COVERED BY INSURANCE: See *Scripture v. Lowell Mut. F. Ins. Co.*, 57 Am. Dec. 111, and cases cited in the note. See also *Moore v. Protection Ins. Co.*, 48 Id. 514, upon the effect of keeping bales of cotton in a store contrary to the stipulations of the policy.

THE PRINCIPAL CASE IS CITED in *Roth v. City Ins. Co.*, 6 McLean, 340, as an interesting and well-considered case, and as sustaining sound doctrines on the law of insurance.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

PHIPPS v. JONES.

[20 PENNSYLVANIA STATE, 280.]

UNINCORPORATED RELIGIOUS SOCIETIES MAY SUE ON CONTRACT made with them in their associate capacity and for the legitimate purposes of their association, even though there be no persons named or described in the contract as trustees or committeemen on behalf of the society.

UNINCORPORATED RELIGIOUS ASSOCIATIONS HAVE QUASI CORPORATE EXISTENCE IN LAW, especially in Pennsylvania since the act of 1731, with power to hold land and build appropriate houses, and to acquire and enforce contract rights.

PLAIN EQUITY PRINCIPLE ALLOWS COMMITTEE OF UNINCORPORATED SOCIETY to sue and be sued as representatives of the whole.

REPRESENTATIVES OF DECEDENT ARE BOUND TO PERFORM HIS CONTRACTS, not to complete his proposals.

ENGAGEMENT TO SUBSCRIBE FOR BENEFIT OF ASSOCIATION IS NECESSARILY MERE PROPOSAL, and therefore revocable until the association is formed; until then there is no one to accept the proposal, and it is withdrawn by the death of a subscriber before its acceptance.

ASSOCIATION HAVING BEEN FORMED, AND HAVING CONTRACTED FOR LOT OR BUILDING in the life-time of a subscriber, and with his express or implied consent, upon the faith of a subscription made to it before its formation, may recover upon the subscription either from him or his representatives.

ASSUMPSIT by Jones and two others, trustees of the Doe Run Valley church, against Phipps and Harvey, administrators, etc., of Ellis Phipps, deceased, to recover upon a subscription to a religious association, was commenced in the justice's court, and the plaintiffs obtained judgment for fifty dollars and costs. The defendants appealed from the judgment of the justice of the peace. The subscription paper recites the need of a church

in Doe Run, and continues: "In order to ascertain the amount of means that could be depended on for this purpose, we, the subscribers, do each of us agree to pay the sums set opposite our respective names for the purpose of building a house for the purpose and in the place aforesaid, or its vicinity, to be under the control of the Presbyterian denomination of Christians; with the understanding that when, in the opinion of at least three of the principal contributors, sufficient money is subscribed to justify the undertaking, they shall give notice to that effect by appointing a time and place of meeting of contributors for the purpose of choosing a building committee, and making such other regulations as may be agreed upon." This paper received the signatures of some two hundred persons, among whom was Ellis Phipps, who subscribed fifty dollars. After the death of Phipps, a notice signed by three contributors, calling a meeting for the purpose of electing a building committee pursuant to the subscription paper, was served on one of the administrators, defendants below, who refused to attend. The meeting was held, the defendants below not attending, and Jones, and George and Andrew Mitchell, plaintiffs below and defendants in this appeal, were chosen as a building committee, with power of collecting and disbursing subscriptions. This committee built the church, and afterwards commenced action against the defendants below to recover on the subscription. Upon the trial of the appeal the judge charged the jury that the death of Phipps before the meeting was called did not discharge his estate from liability, as he had never erased his name from the paper. That a moral consideration would support a promise, and where several promise to contribute to a common object, the promise of each is the consideration for the other promises; that it was immaterial that the subscription paper designated no persons to whom payment was to be made; that the plaintiffs were appointed to receive subscriptions under the provision for the call of a meeting to execute the purposes of the subscription; they therefore were substantially the parties contemplated. Verdict for fifty dollars. The charge was excepted to by the administrators of Phipps, and errors assigned.

Lewis and Hickman, for the plaintiffs in error.

P. F. Smith, for the defendants in error.

By Court, LOWRIE, J. There ought to be no doubt about the right of unincorporated religious societies to sue on a contract made with them in their associate capacity and for the legitimate

purposes of their association, even though there be no persons named or described in the contract as trustees or committeemen on behalf of the society. Such associations have always, and especially since the act of 1731, been recognized as having an associate and *quasi* corporate existence in law, with power to hold land and build appropriate houses, and of course with power to acquire rights by contract, and to vindicate them. And if the English common-law forms are insufficient for such cases, we admit the infusion into our law of the plain equity principle that allows a committee of voluntary societies to sue and be sued as representatives of the whole: *Cullen v. Queensberry*, 1 Bro. C. C. 101; *Cousins v. Smith*, 13 Ves. 544; Story's Eq. Pl., sec. 116. There is, therefore, no difficulty about sustaining this action, if it has a contract to rest upon. In the case of *Chambers v. Calhoun*, 18 Pa. St. 13 [55 Am. Dec. 583], the congregation had been already formed, and the contract of subscription was for the purpose of erecting a new church, and it contained a promise to pay to the building committee, which had not then been appointed, and when appointed, the promisor was one of them; yet the action against him in the name of his fellows, on behalf of the congregation, was sustained.

In the present case the association was not finally formed, nor the erection of a house concluded on, until after the death of Ellis Phipps, one of the subscribers; and these facts raise the question, Was there a complete and binding contract at the time of the death of Ellis Phipps? If there was not, his administrators are not bound by it, and they would have no right to make it complete. They are bound to perform his contracts, not to complete his proposals.

This subscription paper refers to the general desire to have a house of worship, and declares that "in order to ascertain the amount of means that could be depended upon for this purpose," the subscription is made, with the understanding that, when enough is thought to have been subscribed, a meeting of contributors should be called "for the purpose of choosing a building committee, and making such other arrangements as may be agreed upon."

Here was no association, when the subscription was commenced, to whom a promise could be made. The paper was itself the first step towards the formation of an association, and the means of ascertaining its feasibility. It sets out as an experiment, and we can not say that there was a complete contract by the first, or second, or twentieth, or even by the last sub-

scriber, unless we can say that there was an association formed by them that could claim its performance.

There can be no contract without correlative parties, and it is generally essential that there be something more than a moral duty as the bond of the relation and basis of the promise. Where the undertaking is entirely one-sided, there is no right of enforcement. There can be no relation without correlation. An engagement to subscribe for the benefit of an association is necessarily a mere proposal, and therefore revocable until the association is formed. It is a promise of each for the benefit of the associate whole, and remains unattached and incomplete until the association is complete. Until then there is no one to accept the proposal, and in this case it was withdrawn by the death of the subscriber before its acceptance. After his death his administrators could not and ought not to regard the proposal as open to acceptance. If, however, the association had been formed, and a contract for a lot or for a building entered into on the faith of such subscription, in the life-time of the subscriber, and with his express or implied consent, he, and of course his representatives, would have been bound to pay the subscription.

As these views entirely disallow the cause of action, it is unnecessary to consider the other points of law raised on the trial.

Judgment reversed.

SUITS BY AND AGAINST UNINCORPORATED SOCIETIES.—At common law, unincorporated associations of individuals are, in respect to their rights and liabilities, merely partnerships. Mr. Dicey, in his work on parties, says: "An 'unincorporated company' is fundamentally a large partnership, from which it differs mainly in the following particulars, viz.: that it is not bound by the acts of the individual partners, but only by those of its directors or managers; that shares in it are transferable, and that it is not dissolved by the retirement, death, bankruptcy, etc., of its individual members:" Dicey on Parties, 149. Therefore, suits by and against such associations can not, at common law, be brought and maintained in the name of the association, nor in the name of its agents or trustees: *Curd v. Wallace*, 32 Am. Dec. 85; *Detroit Schuetzen Bund v. Detroit Agitations Verein*, 44 Mich. 313; S. C., 38 Am. Rep. 270; but actions must be brought and maintained in the names of all the members. This is the case with partnerships: *Teed v. Elworthy*, 14 East, 210. So in case of these partnerships consisting of numerous members, or so-called unincorporated associations or societies, the action must in the first instance be instituted in the names of all the members: *Curd v. Wallace*, 7 Dana, 190; S. C., 32 Am. Dec. 85; *Williams v. Bank of Michigan*, 7 Wend. 542; *Sullivan v. Campbell*, 2 Hall, 271; *Pipe v. Bateman*, 1 Iowa, 369. On the ground that they have a common interest, members of a voluntary unincorporated association are entitled to join in a suit in regard to matters pertaining to or affecting such interest: *Mears v. Moulton*, 30 Md. 142. On the

other hand, where a society is formed for social and recreative purposes, and a name is assumed under which liabilities are incurred, the members become jointly liable for any indebtedness thus incurred: *Park v. Spaulding*, 10 Hun, 128; *Ridgely v. Dobson*, 3 Watts & S. 118. One who was not a partner at the time of the transaction which forms the basis of the suit is not to be joined in the suit though he afterwards became a partner: *Wilsford v. Wood*, 1 Esp. 182. So one whose name is improperly signed to the articles of association may be omitted as a defendant in an action against the association: *Boyd v. Merrill*, 52 Ill. 151. A liability to a joint-stock association, in which the interests of the members are represented by certificates transferable at will, is a liability to those who are associates when the suit is brought, and an assignment from an original associate by which one of the plaintiffs becomes a member of the association need not be stated in the declaration: *Willson v. Owen*, 30 Mich. 474.

Unincorporated business associations do business as partnerships; each member is liable to the full extent of the partnership indebtedness, and all the members must be joined in a suit by or against the association: *Williams v. Bank of Michigan*, 7 Wend. 542; *Wells v. Gates*, 18 Barb. 554; *Hess v. Werts*, 4 Serg. & R. 356. An association having made an unsuccessful attempt to incorporate does business as a partnership: *Coleman v. Coleman*, 78 Ind. 344. The non-joinder of the other members is, however, matter in abatement, to be pleaded or waived. Thus an action upon a promissory note signed by the directors of a voluntary association should be in the names of all the members as defendants; but if the action is brought against the directors the non-joinder of the remainder of the members must be pleaded in abatement: *McGreary v. Chandler*, 58 Me. 537; see *Robinson v. Robinson*, 10 Id. 240. A distinction is taken between an association whose objects are of general public utility and other societies. Where the association is for private profit or pleasure, with no public object, it is treated as a partnership. So where the association is for private emolument, or for benevolence confined exclusively to the associates, and in which none others participate, the members are partners as between themselves. But a private unincorporated association for general purposes of public utility (in this case a fire-company), a court of equity will not treat as a partnership, nor declare its dissolution and divide its assets among its members, especially on the application of a minority: *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98; see *Pipe v. Bateman*, 1 Iowa, 369. But a mutual benevolent association is not an association for charitable uses, and is a partnership, and its property is liable to the payment of the debts of creditors not members before it can be applied to the claims of members: *Babb v. Read*, 5 Rawle, 151. A band of musicians is a partnership: *Danbury Cornet Band v. Bean*, 54 N. H. 524.

ONE OR MORE MEMBERS MAY SUE OR BE SUED IN BEHALF OF ALL. In the first instance, we have said the suits must be in the name of all the members of the association. But a qualification of expediency soon became necessary. The members of an association often become so numerous that it would be practically almost impossible to ever bring a suit to trial if all the members were made plaintiffs or defendants. The service of original process upon all the defendants, combined with the hearing of pleas in abatement respecting personal disabilities or lack of jurisdiction of the person, might so long occupy the court, together with other hinderances bound to arise where there are numerous parties, that the case might never come to trial, not to speak of the inconvenience of merely joining many parties in a suit. For this reason, a less number than all the members are allowed to represent the

whole when the society is "too numerous" to join all the members. In *Bromley v. Williams*, 32 Beav. 177, a member of a mutual insurance association having suffered loss was allowed to sue the treasurer, secretary, and seven members. No particular reason appeared for the plaintiff's having chosen seven members. A less or greater number would undoubtedly have been sufficient, and the rule is not now confined to seven or any number; yet this precedent may have had its influence upon the New York statute cited below, which permits certain officers of a society to represent it in court when it consists of more than seven members. It is now well settled that where the members of a voluntary unincorporated association are too numerous to be joined in the action, or where the society is composed of very many members, one or more of the members may sue on behalf of all the interested parties, but the representative capacity of the few members must be distinctly stated in the declaration: *Dennis v. Kennedy*, 19 Barb. 517; *Wood v. Draper*, 24 Id. 187; *Smith v. Lockwood*, 1 Code Rep., N. S., 319; *Birmingham v. Gallagher*, 112 Mass. 190; *Snow v. Wheeler*, 113 Id. 179; *Pipe v. Bateman*, 1 Iowa, 369; *Marshall v. Lovelass*, Cam. & N. 217; *Lloyd v. Loaring*, 6 Ves. 773; and see the principal case, where the court say that a plain equity principle allows a committee of an unincorporated society to sue and be sued as representatives of the whole. The mere fact, however, that the society is unincorporated and its members numerous will not warrant a suit by one member in behalf of the society, unless the nature and terms of his authority to bring such suit appear in the complaint: *Habicht v. Pemberton*, 4 Sandf. 657. Actions concerning real property must be brought in the name of those in whom the property is vested. A member of a religious society can not maintain an action of trespass or case to regulate the affairs of the church, or to protect the members in the enjoyment of their religious rights and property. This must be done by the corporation if it be incorporated, or the trustees or organized officers in whom the property of the church or meeting-house is vested: *Owen v. Henman*, 37 Am. Dec. 481. A religious society who are not owners of the fee in the church property can not maintain trespass *quare clausum fregit*: *Bakersfield Cong. Soc. v. Baker*, 40 Id. 668. So the trustees *de facto* of a religious society, whether such society be incorporated or not, may maintain an action against a trespasser for an injury to a meeting-house of the society, for they have possession of the house according to the statute: 2 R. L. 212; *Green v. Cady*, 9 Wend. 414. Though in general an unincorporated company can not at common law sue in the name of its trustees: *Niven v. Spickerman*, 12 Johns. 401. In *O'Brien v. Smith*, 1 Blackf. 99, the holder of a check being the cashier of an unincorporated banking association, and holding it for the use of the concern, was allowed to recover upon it in his own name. In *Lake v. Munford*, 4 Smed. & M. 312, a suit was brought against some of the members of an unincorporated banking company as partners, and it was held that one of the members of the company who was not joined in the suit was a competent witness for the plaintiff.

ACTIONS UPON SUBSCRIPTIONS.—Recovery may be had upon subscription after work has been done and debts contracted upon the faith of the subscriptions: *Robertson v. March*, 3 Scam. 198; *Ryerss v. Congregation of Blossburg*, 33 Pa. St. 114; *Robinson v. Robinson*, 10 Me. 240; *Chambers v. Calhoun*, 55 Am. Dec. 583; *Farmington Academy v. Allen*, 7 Id. 201; *Phillips Academy v. Davis*, 6 Id. 192; *Holmes v. Dana*, 7 Id. 55. The subscriber is liable to the payees named in the subscription paper, or to whom the subscription is made payable: *Caul v. Gibson*, 3 Pa. St. 416; whether it be a building committee: *Hall v. Thayer*, 12 Met. 130; *Gittings v. Mayhew*, 6 Md. 113; or

trustees: *Robertson v. March*, 3 Scam. 198; *Cross v. Jackson*, 5 Hill, 478; *Farmington Academy v. Allen*, 7 Am. Dec. 201; or to one of their number as agent: *Holmes v. Dana*, 7 Id. 55. A committee to whom subscriptions are made payable may maintain an action at law upon a single subscription. The subscribers are not partners in the erection of the building which furnishes the basis of their engagement, but merely shareholders, and their promise is in its nature several, where the proportionate share due from each is distinctly defined: *Hall v. Thayer*, 12 Met. 130; and the treasurer can not maintain suit upon a subscription to be paid "in such installments as may be required by the building committee." The right of suit is in the building committee: *Gittings v. Mayhew*, 6 Md. 113. A case quite similar to the principal case was that of *Farmington Academy v. Allen*, 7 Am. Dec. 201, where it was held that a subscription to pay money to "such persons as may be appointed trustees" for the erection of an academy was merely voluntary, and without consideration; but if upon the faith of such subscription trustees were afterwards appointed and incorporated, and expenses incurred, of which the subscriber had knowledge, and to which he assented by paying part of the amount subscribed, the law would imply a promise to pay the remainder, and an action would lie by the corporation to recover it. See also *Phillips Academy v. Davis*, 6 Id. 192; *Cross v. Jackson*, 5 Hill, 478. But if there is no express promise to pay trustees, the action must be brought in the names of all the other subscribers: *Cross v. Jackson*, 5 Hill, 478. In *Machias Hotel Co. v. Coyle*, 58 Am. Dec. 712, it was held that a corporation formed from an association of individuals for business purposes, without the consent of a subscriber to the association, could not recover upon the subscriber's subscription for money laid out and expended by itself for the use of the defendant, as there is no privity between the parties. The subscriber had not promised to pay the corporation anything. *Ewing v. Medlock*, 5 Port. 82, departs from the rule usually maintained, and holds that the treasurer of an unincorporated association can not maintain action upon a subscription, though it be payable to the "treasurer" of such association; but such an action might have been maintained if the subscription had been made payable to him by his individual name, and in that case the description of him as treasurer of the society would not affect the right. Where the subscription is payable to no particular person or committee, or board of trustees, the action is to be brought in the name of the remaining subscribers, or the congregation: *Cross v. Jackson*, 5 Hill, 478; *Ryers v. Congregation of Blossburg*, 33 Pa. St. 114. In *Chambers v. Calhoun*, 55 Am. Dec. 583, it is held that an action at law to enforce a subscription, though to be paid to no particular person or set of persons by name, may be resorted to as a substitute for a bill in equity, and to prevent a failure of justice, where the equity powers have not yet been extended to such a case, although in England such a promise could be enforced only by a bill in equity. In that case the other members of a building committee appointed by an unincorporated religious association to superintend the erection of a church were allowed to maintain an action to enforce a promise by one of their number to pay a certain amount toward the expenses of the edifice, although they had finished the edifice and had been discharged; for though *functi officio*, they were still trustees for the recovery of this debt, and it was of no consequence that the congregation had appointed another committee to wait upon the promisor, for they could not transfer this chose in action to another committee, so as to enable them to sue in their own names: See *Townsend v. Goewey*, 19 Wend. 424. The members of an association are liable for goods furnished their agent with

their concurrence; but the party furnishing the goods can not sue upon the subscription of the members of the association: *Ridgely v. Dobson*, 3 Watts & S. 118. An agent chosen by the subscribers, who enters upon the work subscribed for and performs it, binds the subscribers jointly; but if sued alone, he can plead the non-joinder of the subscribers only in abatement: *Robinson v. Robinson*, 10 Me. 240. See *Sloan v. Whitlock*, 13 Rich. L. 174.

STATUTES AUTHORIZING SUITS BY AND AGAINST OFFICERS AND COMMITTEES OF ASSOCIATIONS.—In some of the United States and in England there are statutes authorizing unincorporated societies to sue and be sued in the names of their officers, trustees, committees, and the like. Of these acts Chitty says: "There are various acts of parliament which, without incorporating certain bodies of individuals, etc., enable them to sue and entitle others to sue them in the names of their clerks, treasurers, etc., for the time being. Thus by the general turnpike act, the trustees and commissioners of any turnpike road may sue and be sued in the name of one of the trustees, or of their clerk or clerks for the time being, that is, at the time the action is brought: 3 Geo. IV., c. 126, sec. 74. * * * It should be observed that where trustees, clerks, or treasurers, etc., sue or are sued in their official characters by virtue of an act of parliament, the cause of action should in the pleadings be stated to have accrued to or against the principals or company of individuals whom they for this purpose represent. If, however, the statute provide not only that these parties shall be the nominal plaintiffs, but also that the cause of action shall be vested in them in trust, they should then declare accordingly:" 1 Ch. Pl. 16, 17.

The New York statute of 1849, amended in 1851 and 1853, and embodied and re-enacted in section 1919 of the code of civil procedure of that state, provides that any unincorporated company or association composed of not less than seven persons may sue and be sued in the name of its president or treasurer: *Tibbets v. Blood*, 21 Barb. 650; *Olery v. Brown*, 51 How. Pr. 92; *Sewell v. Ives*, 61 Id. 54; *Poultney v. Bachman*, 62 Id. 466. Such statutes as these give a right not existing at common law, and in order that they may be effective, must be strictly pursued: *Timms v. Williams*, 2 Gale & Dav. 621; *Hughes v. Thorpe*, 5 Mee. & W. 656, 667. So under the New York statutes which authorize suit against the president or treasurer, an action is improperly brought if instituted against the president, secretary, and treasurer: *Schmidt v. Gunther*, 5 Daly, 452. These acts conferred upon those officers no right to sue except in cases where the shareholders or associates could before have prosecuted: *Corning v. Greene*, 23 Barb. 33. The liability of members of an unincorporated association as partners is preserved though not extended by these acts: *Kingsland v. Braisted*, 2 Lans. 17. These acts were intended to apply to suits having in view a remedy against the "joint property and effects" of such companies and associations, and when a suit is brought for an injunction, it is not well brought against the president of the association merely: *Rorke v. Russell*, Id. 244.

The seven associate members requisite for the action of the statute need not be named in the complaint. An averment that the association consists of seven or more members is enough: *Tibbets v. Blood*, 21 Barb. 650. The objection of a non-joinder of parties defendant is not available to the defendant association when sued by a firm, several members of which are also members of the association: *Kingsland v. Braisted*, 2 Lans. 17. Under these acts a member of a benevolent society may maintain an action against the treasurer to recover sick-benefits: *Poultney v. Bachman*, 62 How. Pr. 466; though the liability of the individual associates as partners remains: *Kingsland v.*

Braisted, 2 Lans. 17. But an action can not be maintained against the individual members of the association upon a debt due from the association, unless action has first been brought against its president or treasurer, as prescribed by section 1919 of the code of civil procedure: *Flagg v. Swift*, 25 Hun. 623. In *Park v. Spaulding*, 10 Id. 128, it was held that where a society is formed for social and recreative purposes, and a name is assumed under which liabilities are incurred, the members become jointly liable for any indebtedness thus incurred. This case was distinguished in *Flagg v. Swift*, 25 Hun. 623, as applying to a case where there was no organization articles of association or by-laws, for then, as was held in that case, the president or treasurer of the society must have been sued first before an action could have been maintained against the individual members. The judgment in an action under the New York statute of 1849 and the execution is properly against the president as such, and they bind the joint property of the association, not the individual property of the president: *Schuylerville Bank v. Van Derwerker*, 74 N. Y. 234.

A joint-stock company, formed under the laws of New York, by which such companies may be sued in the first instance in the names of the officers of the association, is not a corporation, but a copartnership, and a member may be liable as an individual partner in Massachusetts. Such laws respecting the remedy are of local operation, and not binding outside of the enacting state: *Boston & Albany R. R. Co. v. Pearson*, 128 Mass. 445. In *Dinsmore v. Philadelphia & Reading R. R. Co.*, 11 Phila. 483, it was held that an averment that the complainant is a joint-stock association, formed in the state of New York under the laws of that state, neither imports that it is a corporation created by another state, nor that its members are citizens of another state, and the bill was therefore dismissed by the United States circuit court for want of jurisdiction. A contrary opinion is maintained in *Maltz v. American Express Co.*, 1 Flipp. 611. There it was held that a joint-stock association, formed under the laws of New York, and suing or being sued in the name of its president or treasurer, is to be deemed a citizen of that state, at least so that an action can be maintained against it by a citizen of another state, in a federal court, without regard to the citizenship of the individual members of the association.

By the Kentucky statute of 1814, the trustees of an unincorporated religious society, in whom title is vested, may sue in their own names for the safe keeping of the property: *Curd v. Wallace*, 32 Am. Dec. 85. The Kentucky act of 1835 authorizes a church to appoint and sue by a committee, and such committee may sue: *Hadden v. Chorn*, 8 B. Mon. 70; and the members of the committee need not be members of the church: *Humphrey v. Burnside*, 4 Bush, 215, 224.

A statute of Iowa enacts the common law. There the suit may be brought in the names of all the members, or in the name or names of one or more in behalf of all: *Keller v. Tracy*, 11 Iowa, 530. Under section 218 of the Ohio code, an action to enforce against a partnership a liability arising under its provisions may be brought against the partnership, either in the name of the firm or in the names of the persons who compose it, at the option of the plaintiff: *Whitman v. Keith*, 18 Ohio St. 134. Under a statute providing that a voluntary unincorporated association may sue by its distinguishing name, a military company having such a name may sue by that name: *Fox v. Narramore*, 36 Conn. 382. Where a banking copartnership has stopped payment, it is still able to sue by its public officer, under the statute to that effect: *Davidson v. Cooper*, 11 Mee. & W. 778.

SUITS BY AND BETWEEN SOCIETY OR ITS OFFICERS AND MEMBERS.—Where there is nothing in the constitution of a joint-stock company which regulates the remedies of shareholders as between themselves, the general law of partnership must govern, and a shareholder or his assignee can not maintain action against the company for goods furnished, until a final settlement of the partnership account and a balance struck: *Bullard v. Kinney*, 10 Cal. 60. See *McMahon v. Rauhr*, 47 N. Y. 67. A member of a band, one of the by-laws of which is that any member upon leaving the band shall leave all his interest with the band, who leaves the band and takes his instrument with him, and refuses to give it up, may be sued in trover to recover the instrument by the remaining members of the band. It was a case of dissolution of copartnership, where a settlement had been reached: *Danbury Cornet Band v. Bean*, 54 N. H. 524. Although the articles of association provide for the management of the society, yet any member may resort to the courts for redress in case of fraudulent appropriation or willful destruction of the joint property: *Dennis v. Kennedy*, 19 Barb. 517. Mere contributors to a fund creating a trust for mere charitable purposes can not call the trustees to an account for a breach of trust, but they may if they have an interest in the trust, such as *cestuis que trust*, or have some reversionary interest in the trust: *Ludlam v. Higbee*, 11 N. J. Eq. 342. But all the trustees who have participated in the execution of the trust, or their personal representatives if they be dead, should be parties to a bill filed by a stockholder for the settlement of the trust estate: *McKinley v. Irvine*, 13 Ala. 681. A member of a building committee who has advanced money to the treasurer of the committee for the payment of debts incurred by the committee may maintain a bill in equity against the treasurer to recover the amount, when there are sufficient funds in the hands of the treasurer to repay the amount; but he must make the parish who appointed the committee, and the other members of the committee, parties to the bill. The members of the committee were partners: *Foster v. Bryant*, 16 Gray, 190. The treasurer of a voluntary association for charitable purposes will be decreed to account for moneys in his hands, and to pay them over according to the intention of the association: *Penfield v. Skinner*, 11 Vt. 296. Less than all the shareholders in a joint-stock company may sue on behalf of themselves and the other shareholders for the purpose of compelling the directors of the company to refund moneys improperly withdrawn by them from the company, and applied to their own use; and to such a case an act of parliament providing that all suits by or on behalf of the company shall be prosecuted in the name of the chairman or one of the directors does not apply: *Hichens v. Congreve*, 4 Russ. 562.

Where acts making an officer of the company its representative are passed, "legal proceedings between the public officer and individual members are as unobjectionable as proceedings between incorporated companies and their shareholders:" Dicey on Parties, 156. A member of a joint-stock association may maintain action against the association, or an officer thereof, to recover damages for maintaining a private nuisance: *Sallsman v. Shults*, 14 Hun, 256. An act of parliament allowing suits by a joint-stock company against any person to be commenced in the name of the chairman, which it was also permissible to use in all cases where before it would have been necessary to state the names of the partners, was held not to authorize suit to be commenced by the chairman against one of the partners without making the other partners parties: *McMahon v. Upton*, 2 Sim. 473; see also *Hichens v. Congreve*, 4 Russ. 562. A bill filed in the name of a corporation which consisted of nine trustees against five of the trustees in their individual ca-

capacity is maintainable: *Bethel v. Carmack*, 2 Md. Ch. 143. The members of an Odd Fellows lodge are not liable at law to a representative of a deceased member for a sum provided by the constitution to be paid to next of kin to defray the funeral expenses of the deceased brother: *Payne v. Snow*, 12 Cush. 443; S. C., *ante*, p. 203.

STATUTES RESPECTING RELIGIOUS SOCIETIES.—Where a law provides that a religious association by voluntarily associating and performing other acts shall become a body corporate, the society by performing such acts obtains a corporate existence, and may maintain suit in that capacity: *Shelburne M. E. Soc. v. Lake*, 51 Vt. 353; or be sued by a member upon a contract made by the authorized agents of the society: *Sawyer v. Methodist etc. Soc.*, 18 Id. 405. And a compromise of a suit by a majority of the members is binding upon the minority: *Horton v. Baptist Church*, 34 Id. 309. A society authorized by legislative act to meet, choose officers, and repair their meeting-house may sue for the destruction of the building after it was repaired: *Tilden v. Metcalf*, 2 Day, 259. The seceding members of a chartered society, forming a new voluntary association, can not maintain a suit for the recovery of debts due the corporation: *Smith v. Smith*, 3 Desau. 557. By statute in Indiana, a church organization can sue only in the name of wardens and vestrymen or trustees of the church: *Drumheller v. First etc. Church*, 45 Ind. 275. And an English statute allows church-wardens and overseers to be sued in certain respects: *Doe v. Harpur*, 2 Dow. & Ry. 708. In *Willard v. Trustees etc.*, 66 Ill. 55, the trustees of a church were allowed to sue as a corporation *de facto*. It was held that proof that the trustees made contracts as a corporate body, superintended the erection of the church building, and generally performed the duties pertaining to their position, and the introduction of a formal certificate, afterwards signed by the trustees, which referred to the original organization, furnished sufficient proof of organization and user under it to establish the existence of a corporation *de facto*, and to enable it to maintain suit as a corporation. The trustees *de facto* in whom possession of the church property is vested may maintain trespass: *Green v. Cady*, 9 Wend. 414. See also on this head "Statutes Authorizing Suits by and against Officers and Committees of Associations," *supra*.

THE PRINCIPAL CASE IS CITED IN *Hedge and Horn's Appeal*, 63 Pa. St. 279, to the point that a subscription to an association or partnership is merely voluntary until the society is formed, and those subscribers not consenting to the organization are not bound; and in *Burton's Appeal*, 57 Id. 218, to the point that religious societies have from the earliest times been invested as *quasi* corporations with the right to acquire and hold property as a means of promoting their praiseworthy objects.

PENNOCK'S ESTATE.

[20 PENNSYLVANIA STATE, 268.]

ONLY SO MUCH OF ENGLISH LAW AS IS ADAPTED TO OUR CIRCUMSTANCES and customs is properly recognized as part of our common law.

WORDS IN WILL EXPRESSIVE OF DESIRE, RECOMMENDATION, AND CONFIDENCE are not words of technical but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust, and the old Roman and English rule on this subject is not part of the common law of Pennsylvania.

WORDS OF DESIRE, RECOMMENDATION, AND CONFIDENCE IN WILL MAY AMOUNT TO DECLARATION OF TRUST, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion.

MERE WORDS OF DESIRE, RECOMMENDATION, AND CONFIDENCE IN WILL. CREATE NO TRUST. The testator willed to his wife his real estate "during her natural life," and his "personal estate of every description * * * absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children." By this will the absolute ownership of the personal property of the testator is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and no trust is thereby created.

APPEAL from the orphans' court of Chester county. The widow of Isaac Pennock disposed of all her property by will without referring to her husband's will, and provided for only three of the seven children. Coates, the husband of one of the children, filed a petition in the orphans' court setting forth the claims of himself and wife under the will of Isaac Pennock, and calling upon David McKonkey, the executor of the widow of Isaac Pennock, for an account, and praying for general relief. McKonkey demurred, denying that Pennock's children had any right under their father's will. The demurrer was sustained and the petition dismissed. This decree of the orphans' court was reversed by this court, and the case sent back for further proceedings. The case was referred to auditors; and to the decree of the orphans' court, pursuant to their report, a second appeal was taken. After the decision in that appeal a report of a master was filed, and this is an appeal based upon exceptions taken by McKonkey and others to that report. The case is otherwise sufficiently stated in the opinion.

P. S. Smith, H. J. Williams, and T. S. Bell, for the appellants.

J. J. Lewis and J. M. Read, for the appellees.

By Court, **LOWRIE, J.** This case has already been twice before this court, and the action of the court on those occasions is reported in *Coates' Appeal*, 2 Pa. St. 129, and in *McKonkey's Appeal*, 13 Id. 253. In both those instances, the will of Isaac Pennock has undergone the construction of this court, in so far as it relates to the rights here in controversy; and now, when the cause comes on for final determination, we are asked by the appellants to hear them again on their rights under that will, before the door of justice is forever shut against them.

We have therefore heard and reheard, before a full court, the

argument which the parties have thought proper to present on the original question, partly because we could not say that the question was conclusively settled by an interlocutory order, and partly because it is impossible to deny that there is an irreconcilable discrepancy in the two opinions and orders heretofore announced in this very cause. We have given to the question a very careful consideration, and are now prepared to pronounce the judgment which is, in our opinion, demanded by the law.

For the purpose of introducing this question in its general aspect, we need to state no more than that Isaac Pennock devised to his wife Martha all his real estate for life, and all his personal estate "absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children." The mother is now dead, and the children claim that the bequest of the personal estate was a trust for their benefit, and have filed their petition against their mother's executor for an account. The argument in support of the petition is that the words which I have quoted from the will are of a technical character, and do of themselves import a trust, and that such is here the proper construction of them, unless there are other expressions controlling them and showing a contrary intent.

Certainly the principles of equity are part of our common law. it is the very essence of common or customary law that it consists of those principles and forms which grow out of the customs and habits of the people. It is therefore involved in its very nature that only so much of the English law as is adapted to our circumstances and customs is properly recognized as part of our common law. This same principle is most emphatically involved in the cardinal maxim of all common law, *Cessante ratione legis, cessat et ipsa lex*.

The technical effect insisted upon as belonging to the words already quoted, having never received a judicial sanction in this state until the first opening of this cause, and no rights having ever been finally decided according to it, the question is still fairly open for consideration, whether, under our law, these words have any such technical character. It is of course a consideration of some weight, that besides our provincial existence, with many laws and institutions peculiar to ourselves, we have existed as an independent state for three quarters of a century without learning that such words have any technical meaning by our law, or are to be construed differently from words of common parlance.

It is unquestionable that such modes of expression were formerly used in the Roman and in the English law in order to create a trust, and it was founded on good reason; but if that reason had passed away before the settlement of this country, then the rule which depended upon it was not imported as part of the law which we brought from the mother country. That it remains of any force in England, after the reason of it has ceased, is not surprising; for it is a common fate of institutions to outlive the causes which gave rise to them, and thus very often the form survives the principle which it was designed to express.

It is acknowledged that the rule by which a trust is raised out of such words was imported into the English from the Roman law. Its origin, therefore, in the Roman law, is a relevant subject of inquiry; for if we find it arising there, not from the ordinary meaning of the words, but under the constraint of circumstances which have no existence here, the force of the Roman rule will be much impaired, if not destroyed. If, under their law, words of common parlance acquired a technical value by reason of a peculiar institution, then that technical value depends upon circumstances and ceases with them, and the common meaning alone remains.

To construe such words, after that, as technical, is in almost all cases to pervert the true meaning of the words, unless other parts of the instrument clearly show that they are technically used.

It was part of the Roman law that the heir or devisee accepting the estate of a decedent became at once charged with the payment of all his debts, whether the estate was sufficient to discharge them or not. Hence, and by way of compensation, he was not bound to pay any of the legacies bequeathed by the testator; but this matter was left by the law entirely to his discretion. It was of the essence of a Roman will that the devisee should be universal successor to the property and debts of the decedent. He was in form and substance what we would call executor and sole devisee and legatee, with the additional qualification that he (or they, for many might be joined) was bound personally for the debts if he accepted the devise.

It is plain how restricted was the right of devise under such a law. When all the testator's bequests could be defeated at the pleasure of the devisee or instituted heir, he had no alternative but to use words of confidence, recommendation, or entreaty as to any legacies or special devises, and such words would be

much more likely to be regarded than the clearest imperative words.

Moreover, there were great and peculiar difficulties in making a valid will at all under the Roman law, owing to the excessive strictness and complexity of the formalities required; and hence it was usual to add a codicil, in which the testator entreated his heir at law, if the will should not stand, to make the desired dispositions, or to hold the property for the benefit of the persons named in the codicil. Here again words of entreaty are much more appropriate than imperative words. Under the circumstances, they clearly proved an intention to impose a duty on the general devisee as far as was possible, and not merely to intrust him with a discretion. He intended a legacy; it was the law that made it discretionary in disregard even of imperative words.

It is very plain that such an institution is at war with moral principle, and it could not exist long without giving rise to many aggravated cases of breach of such trusts, that would call loudly on the law to interfere with the discretion of the heir or devisee, and enforce the clear intention of the testator. Hence arose an alteration of the law, and the pretors were required to enforce trusts that were created in this form. Under such circumstances, the new rule was a proper one, for it enforced the very duty imposed by the testator in the best form in which he was allowed to express it. No doubt the law continued after the reason of it had ceased; but then it contravened the intention of the testator by enforcing as a binding obligation what had been intrusted to the discretion of the heir or devisee. These matters are fully illustrated in Domat, 2, 3, 1; 1 Spence's Eq. Jur., 435; and in the Corpus Juris Civ. Inst. 2, 20 and 25; Dig. 28, 1 and 29, 7 and 30, 31 and 32; Code, 6, 23 and 36.

Very similar was the origin of such trusts in England. The power of devise existed among the Anglo-Saxons in its fullest extent, and hence we might expect to find no such trusts among them, and it is said that no Anglo-Saxon will has been found containing the appointment of an executor charged with trusts: 1 Spence's Eq. Jur. 23, quoting Hinks' Dissert. 37. But after the Norman conquest, and under the strict principles of feuds, devises of land were not allowed. Hence the frequent resort to conveyances in trust, in order to be able to make provision for younger children, and for other purposes. These trusts were at first of no binding obligation, but depended for their execution entirely upon the honor of the grantee, and it was therefore

very natural and appropriate that words of recommendation, desire, entreaty, and confidence should be used. Dishonesty would, of course, often occasion enormous grievances arising out of breaches of such confidence. It was very easy then for an English chancellor to bring in the Roman law to correct such evils. It was really enforcing what was intended to be a trust, and changing the law to do it. It was equity stepping in to correct the deficiencies of common-law institutions, and modifying them into accordance with the changing customs and circumstances of the people. The rule, thus properly introduced, has of course outlived the circumstances which gave it birth, and which alone ought to maintain it.

But the rule is fading away even in England. The disrelish with which it is received by the legal and judicial minds of that country may be seen in the doctrine of extreme certainty required as to the subject and object of the recommendation: *Wright v. Atkyns*, 1 Ves. & B. 313; S. C., Turn. & R. 157; *Ex parte Payne*, 2 You. & Col. 636; *Tibbits v. Tibbits*, 19 Ves. 664; *Harland v. Trigg*, 1 Bro. C. C. 142; and in the fact that it is degraded into the class of implied or constructive, and not express, trusts: Lewin on Trusts, 66; Jeremy's Eq. Jur. 99; 2 Roper on Legacies, 380, etc.; 2 Story's Eq. Jur., sec. 1074; *Hill v. Bishop of London*, 1 Atk. 619; and that it is everywhere regarded as frustrating the will of the testator: *Sale v. Moore*, 1 Sim. 540; *Meredith v. Heneage*, Id. 551; *Wright v. Atkyns*, 1 Ves. & B. 315; 2 Story's Eq. Jur., secs. 1069-1074.

Such words are not now regarded in England as creating a trust, unless on the whole they ought to be construed as imperative: 2 Spence's Eq. Jur. 65; *Macnamara v. Jones*, 1 Bro. C. C. 481; *Meggison v. Moore*, 2 Ves. jun. 632. And the rule is treated as a mere artificial one, that is to be strictly limited to the demands of authority. It looks upon the words as *prima facie* words of trust: *Podmore v. Gunning*, 7 Sim. 665; *Worsley v. Granville*, 2 Ves. sen. 335; *Berkley v. Ryder*, Id. 533. Yet any words or expressions are eagerly seized hold of as indications of a contrary intent: *Meredith v. Heneage*, 1 Sim. 550, 552; *White v. Briggs*, 15 Id. 33; S. C., Id. 300; *Knight v. Knight*, 3 Beav. 172; *Shaw v. Lawless*, 5 Cl. & Fin. 147, 153; *Harland v. Trigg*, 1 Bro. C. C. 143; *Foley v. Parry*, 2 Myl. & K. 144.

Where it is apparent that the kindness or justice or discretion of the devisee is relied on, no trust arises: *Bardswell v. Bardswell*, 9 Sim. 319; *Pope v. Pope*, 10 Id. 1; *Curtis v. Rippon*, 5 Madd. 434; *Knight v. Knight*, 3 Beav. 148; S. C., Id. 172, 176;

Young v. Martin, 2 You. & Col., N. S., 582, 590; *Malim v. Keighley*, 2 Ves. jun. 530, 533. And if it can be implied from the words that a discretion is left to withdraw any part of the subject of the devise from the object of the wish or request, or to apply it to the use of the devisee, no trust is created: *Lechmere v. Lavie*, 2 Myl. & K. 201; *Pope v. Pope*, 10 Sim. 5; *Knight v. Knight*, 3 Beav. 173, 174; *Wynne v. Hawkins*, 1 Bro. C. C. 179, *Sprange v. Barnard*, 2 Id. 585; *Pushman v. Filliter*, 3 Ves. jun. 7; *Eade v. Eade*, 5 Madd. 121; *Horwood v. West*, 1 Sim. & St. 389; *Flinn v. Hughes*, 6 Beav. 342; *Bland v. Bland*, 2 Cox, 354; see also 2 Spence's Eq. Jur. 65 et seq.

Now, it is very plain that on the former hearing of this cause Chief Justice Gibson regarded Mrs. Pennock as having the right to withdraw the principal as well as the interest for her own use as the absolute owner. He says: "It is plain that she was to use, not only the income of the personal estate, but the estate itself, as if she were the untrammelled owner of it. What other meaning can be given to the word 'absolutely'? We may not strike it out, and if he meant not to give her a right to consume both principal and proceeds he knew not what he said:" *McKonkey's Appeal*, 13 Pa. St. 258. And the order of reference to ascertain "the value of the surplus of the testator's personal property unconsumed at Mrs. Pennock's death" was a consequence of that opinion. But it was not a legitimate consequence, as the case last above referred to proves; for if she might apply the principal to her own use, then there can be no trust, and the case ought to have been dismissed, not referred. How could there be a trust in the legal sense of that word? No trust or contract that is uncertain is enforced by law; because the law would have to define it, or in other words create it, before enforcing it.

If this is a trust, it was so in the mother's life-time, and could have been enforced as such. But how compel her to hold for the benefit of her children that over which she had the absolute control, and which she could spend as she pleased? If she could thus use it, she was no trustee in the eye of the law, and her representative can not be so treated after her death.

In fact, she did act all her life-time as if she were the absolute owner, and did convert almost the whole of the property to her own use without any one of her children complaining of any breach of trust. And it is not now the surplus in fact that they are seeking to recover; but they are claiming from her executor

an account of their property converted by their mother to her own use.

It can not be denied that there is considerable discrepancy in the English decisions on this subject, and nothing less can reasonably be expected. An artificial rule like the one insisted on here, that is founded on no great principle of policy, and that sets aside while it is professing to seek the will of the testator, must continually be contested and must be frequently invaded. And no one can read the English decisions on this subject without suspecting that all important wills wherein similar words are found become the subjects of most expensive contests, and give rise to those family quarrels which are the worst and most bitter and distressing of all sorts of litigation. We may well desire that such a rule shall never constitute a part of our law. It rejects the plain common sense of expressions, and it is not in human nature to submit to it without a contest.

Let us examine this will without the aid of this antiquated rule. Isaac Pennock says: "I will and bequeath unto my dear wife, Martha Pennock, the use, benefit, and profits of all my real estate during her natural life, and also all my personal estate of every description, including ground-rents, bank-stock, bonds, notes, book-debts, goods and chattels, absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children."

Now, it is plain that if the words of confidence were left out, Mrs. Pennock would have taken the personal estate absolutely. What did he intend by those words of confidence? Evidently to commit all the personal property to the discretion of his wife. He expected her to use it as she pleased, and to leave what should remain at her death "justly" among his children; but he enjoined nothing. His will was to give her the power of disposal, because he had confidence in her. He intended no interference with or guidance of her discretion; but trusted all to a mother's heart. Yet this is the intention which the law is expected to guide. And in order to enforce this demand, it is insisted that she had but a life estate in the personal property. But the testator excludes this construction, for he places the real estate "for life" in contrast with the personal estate "absolutely;" and contrasted expressions can not be equivalent. And yet, without forcing this construction, this case is at an end unless it be insisted that the mother took no estate at all for herself; which is too absurd to be thought of. And as to

the word "surplus," it can have no other meaning than the one above given, and that given by Chief Justice Gibson in the opinion before referred to. The view here taken of the words of confidence is further confirmed by other parts of the will, where he with "perfect confidence" and "full confidence," intrusts his children to the kindness of their mother. Here, surely, he was intending no legal trust.

If the will of the testator was to give to his wife the property, to be disposed of at her discretion, it is not for the court to say that she has exercised that discretion badly; and it is impossible to say wherein, under a change of circumstances, he would have exercised it differently.

We may now add that we know of no American case wherein the antiquated English rule has been adopted, and that, as it is now regarded even in England, this case would not now be governed by it: *Wynne v. Hawkins*, 1 Bro. C. C. 179; *Sprange v. Barnard*, 2 Id. 585; *Eade v. Eade*, 5 Madd. 118; *Flint v. Hughes*, 6 Beav. 342; *Ex parte Payne*, 2 You. & Col. 636; *Bland v. Bland*, 2 Cox, 354; *Pushman v. Filliter*, 3 Ves. jun. 7; *White v. Briggs*, 15 Sim. 33; *Meredith v. Heneage*, 1 Id. 542; *Williams v. Williams*, 5 Eng. L. & Eq. 49. See also *Coates' Appeal*, 2 Pa. St. 131; and herein we agree with the learned judge of the court below.

It is not to be disputed that these views are directly opposite to those expressed by this court when this cause was first heard; but we can not help it. We are bound to decide this cause upon our present views of the law. And such changes of opinion in the progress of a cause are not at all uncommon, owing to the increase of information or the change of judicial functionaries, or both. The case of *Shaw v. Lawless*, 5 Cl. & Fin. 129, is an illustration of this, and it belongs to the class of cases we have been discussing. One lord chancellor declared it a case of trust, and a new chancellor granted a rehearing and declared the reverse, and his decree was affirmed in the house of lords. Even in the present case, the opinion first declared adopted the old English rule in all its stringency, while the second one obviously flinches from a full application of a construction so artificial and unnatural. Such vacillations are to be expected where an unusual rule comes to be first applied. It is well to declare at once, and before any wrong is consummated by our judgment, that the rule has no foundation in any of our customs or institutions, and no place in our law. Our conclusions are:

1. Words in a will expressive of desire, recommendation, and confidence are not words of technical but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania.

2. Such words may amount to a declaration of trust, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion.

3. By this will the absolute ownership of the personal property of Mr. Pennock is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and that no trust is created thereby.

Decree, January 27, 1853. This cause came on to be heard on an appeal from the decree of the orphans' court of Chester county, and was argued by counsel, and thereupon, on consideration thereof, it is ordered, adjudged, and decreed that all the orders and decrees made in the said orphans' court, and in this court, since the appeal from the first decree of the said orphans' court, sustaining the demurrer of the respondents and dismissing the bill or petition of the complainants, be vacated and set aside, and that the said first decree of the said orphans' court be affirmed, and that the parties do severally pay their own costs.

PRECATORY TRUSTS.—A testator's children take a vested interest in an estate devised to the wife, to be divided "amongst my children as she may think best," and on failure of appointment the children take equally at the wife's death: *Cathey v. Cathey*, 49 Am. Dec. 714, and see the cases cited in the note. But the children of a married daughter take no estate under the will by which the testator bequeaths lands and negroes to his married daughter "and her heirs forever," with a desire that the negroes work on the land he has left her "for the support of her and her children." The gift is in the daughter exclusively: *Barnes v. Simms*, Id. 435. But where, though the gift is absolute in the first instance, yet by plain, unmistakable language the testator intended a trust, his intention will be effective: *Lucas v. Lockhart*, 48 Id. 766. The subject of precatory trusts is discussed at length in the note to *Harrisons v. Harrison's Adm'r*, 44 Id. 372-379. The principal case is cited in *Beck's Appeal*, 46 Pa. St. 532, and declared to establish the three propositions which the court in the principal case enumerate at the end of the opinion. "And this," said Read, J., in that case, "I believe is the present English doctrine."

MERE WORDS OF RECOMMENDATION OR DESIRE DO NOT CREATE TRUST in an absolute devisee or legatee. The principal case is cited to this point in *Walker v. Hall*, 34 Pa. St. 487; *Kinter v. Jenks*, 43 Id. 448; *Second Reformed etc. Church v. Disbrow*, 52 Pa. St. 224; *Spooner v. Lovejoy*, 108 Mass. 534; *Hess v. Singler*, 114 Id. 59; *Wood v. Seward*, 4 Redf. 275; unless by express

words of the testator it appears that the recommendation was intended to be obligatory, as where there are words expressive of desire as to the direct disposition of the estate: *Burt v. Herron*, 66 Pa. St. 402.

COMMON LAW PREVAILS IN MICHIGAN, except in so far as it is repugnant to or inconsistent with the state statutes or state constitution: *Stout v. Keys*, 43 Am. Dec. 465; in Massachusetts, so far as it is applicable to the condition of that state: *Commonwealth v. York*, Id. 373; and in Kentucky it prevails, except as modified by statute or local institutions: *Lathrop v. Commercial Bank*, 33 Id. 481.

THE PRINCIPAL CASE IS CITED in *Jaureche v. Proctor*, 48 Pa. St. 471, as expounding the meaning of the word "surplus."

LORD v. OCEAN BANK.

[20 PENNSYLVANIA STATE, 384.]

MAKER OF ACCOMMODATION NOTE CAN NOT SET UP WANT OF CONSIDERATION as a defense against it in the hands of a third person, though it be there as collateral security merely.

ACCOMMODATION PAPER IS LOAN OF MAKER'S CREDIT WITHOUT RESTRICTION as to the manner of its use.

FACT THAT HOLDER HAS OTHER COLLATERAL SECURITIES FOR SAME DEBT more than sufficient to cover it without the accommodation note, also pledged, but which have not been realized so as to extinguish the debt, is no defense for the accommodation maker against the pledgee of the note; but if the debt had been so extinguished, the pledgee could not recover.

WHATEVER IS NOT SAID IN AFFIDAVIT OF DEFENSE IS TAKEN NOT TO EXIST. JUDGMENT RENDERED FOR WANT OF SUFFICIENT DEFENSE, under act requiring nature and character of the defense to be sworn to, will not be reversed because the circumstances of the case were such that the defendant could not know with certainty whether he had a good defense or not. The defendant should ask for further time, first satisfying the court that he has made diligent effort to inform himself, and has failed, not through his own laches; or if the defense depends upon an inspection of documents in the possession of the adverse party, and such inspection has been demanded and refused, he should move for an indefinite suspension of the judgment.

ASSUMPSIT on a promissory note. The opinion sufficiently states the case.

Arundel and Fallon, for the plaintiffs in error.

Hopper, for the defendants in error.

By Court, BLACK, C. J. This suit was on a promissory note made by W. H. Lord & Co., payable to the order of Daniel Adee. The makers received no consideration from the payee. The note was made solely for his accommodation. He indorsed it to the Ocean Bank as collateral security for a note of his own

which had been previously discounted there. These facts were stated in an affidavit of defense, but the district court gave judgment for the plaintiff, being of opinion that if proved they would be insufficient.

It has been ruled in several cases that one to whom a negotiable instrument has been indorsed as collateral security for a pre-existing debt, who has given no other consideration for it, is not a holder for value: *Petrie v. Clark*, 11 Serg. & R. 377 [14 Am. Dec. 636]; *Sailor v. Hertzog*, 4 Whart. 258; *Depeau v. Waddington*, 6 Id. 220 [36 Am. Dec. 216]. The maker, it is said, may aver any ground of defense against the indorsee of such a note which would have been competent against the original payee: *Kirkpatrick v. Muirhead*, 16 Pa. St. 120. This rule, taken without modification, would make the facts of the present case a complete defense; for if the payee had kept the note until maturity, and brought suit on it himself, he could not recover. But the maker of an accommodation note can not set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely. He who chooses to put himself in the front of a negotiable instrument for the benefit of his friend must abide the consequence: *Walker v. Bank of Montgomery*, 12 Serg. & R. 382; and has no more right to complain if his friend accommodates himself by pledging it for an old debt than if he had used it in any other way. This was decided in *Appleton v. Donaldson*, 3 Pa. St. 381, a case strongly resembling the present one. Accommodation paper is a loan of the maker's credit without restriction as to the manner of its use.

The affidavit further alleges that there were other collateral securities for the same debt more than sufficient, without this note, to cover it. If these other securities had been realized, and the debt extinguished by them, the plaintiff could not recover. But the affidavit does not say that; and whatever is not said in an affidavit of defense is taken not to exist.

But we have been much pressed to reverse this judgment because the circumstances of the case were such that the defendant could not know with any certainty whether he had a good defense or not. We repeat what we have often said already, that the law requiring the nature and character of the defense to be sworn to is a just and necessary one, and its influence on the administration of justice has been most salutary. The only regret of those who are well informed on the subject is that it is not universally adopted in all the courts of the

state. Undoubtedly a case may arise, once in a while, where the defendant is not and can not be so informed of the facts as to enable him to swear conscientiously what they are, or even to make up an opinion about them. In such a case, let the defendant satisfy the court that he has made diligent effort to inform himself, and that he has failed by no fault or laches of his own, and we can venture to assure him that he will have as much time as is reasonably necessary. If the defense depends upon books or papers which are in the hands of his adversary, and if he shows that he has demanded an inspection of them and been refused, the rule for judgment ought to be indefinitely suspended, since all presumptions are against the party who has evidence in his exclusive possession and conceals it. But here the defendant, without asking for an enlargement of the time, and without claiming his right (for his right it certainly was) to examine the papers in the plaintiff's hands, put in an affidavit which discloses no defense. He rested his cause upon it, and what could the court do but give judgment against him?

Judgment affirmed.

PLEADINGS ARE TO BE TAKEN MOST STRONGLY AGAINST PLEADER: *President etc. of Natchez v. Minor*, 48 Am. Dec. 727.

DEFENSES NOT RAISED BY PLEADINGS ARE WAIVED: *Stewart v. Preston*, 44 Am. Dec. 621. The principal case is cited in *Marsh v. Marshall*, 53 Pa. St. 399, to the point that whatever is not raised in the affidavit of defense is taken not to exist. So in *Sterling v. Mercantile etc. Ins. Co.*, 32 Id. 78.

ACCOMMODATION INDORSER IS LIABLE TO HOLDER RECEIVING PAPER AS SECURITY for pre-existing liability: *Kimbrow v. Lytle*, 31 Am. Dec. 585; *Blanchard v. Stevens*, 50 Id. 723. The principal case is cited to this point, as respecting a maker or indorser, in *Work v. Kase*, 34 Pa. St. 140; *Moore v. Baird*, 30 Id. 139.

ACCOMMODATION PAPER IS LOAN OF MAKER'S CREDIT without instruction as to the manner of its use. The principal case is cited to this point in *Lenheim v. Wilmarding*, 55 Pa. St. 75; *Dunn v. Weston*, 71 Me. 273. And the holder or indorsee may recover, though he knew of the nature of the transaction: *Thatcher v. West River Nat. Bank*, 19 Mich. 202.

THE PRINCIPAL CASE IS CITED in *Bank of United States v. Peabody*, 20 Pa. St. 458, as deciding that "even where collateral securities are placed in the custody of the creditor, if he has been guilty of no negligence, has realized nothing from them, and has never withheld information concerning them when requested to furnish it, he is entitled to judgment against the principal debtor" upon the original obligation. In *Lewis v. United States*, 14 Nat. Bank. Reg. 70, it is cited to the point that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor.

GODLEY v. HAGERTY.

[20 PENNSYLVANIA STATE, 387.]

ONE ERECTING BUILDING TO RENT MUST EMPLOY REASONABLE SKILL AND DILIGENCE in its erection, regard being had to the uses and purposes for which it is designed.

OWNER OF BUILDING THAT HE HAS ERECTED NEGLIGENTLY and with insufficient and improper materials, and has rented, is liable in damages for injuries to one employed in the building resulting from its insufficient construction.

ONE ERECTING BUILDING EXPECTING TO RENT IT AS WAREHOUSE, and knowing that in such case a strong building would be needed, suitable for heavy storage, and knowing after its completion that there were defects in it which unfitted it for the designated purpose, who leases it for warehouse purposes, yet does not stipulate in his lease against its being used for heavy storage, is liable in damages to an employee of the lessee, who, while attending to his proper business therein, is injured by the fall of the building.

ONE INJURED BY FALL OF BUILDING NEGLIGENTLY CONSTRUCTED may show, in a suit for damages against the owner, that the owner knew that it would be necessary for the building to be of the strongest kind in order to be suitable for the purpose for which it was used at the time of the accident, and that he expected to lease it for this use.

CASE by Hagerty against Godley to recover damages for injuries to the plaintiff resulting from the falling of a warehouse of which the defendant was the owner. The declaration alleged that the defendant owned a lot of ground in Philadelphia upon which he erected a five-story brick building so loosely, carelessly, unskillfully, and negligently, and of such insufficient and improper materials, that on account thereof it suddenly fell while the plaintiff, who was a laborer, was engaged therein in attending to his proper business, and that the plaintiff was injured thereby. Issue was joined upon a plea of not guilty. The defendant had leased the building to William D. Lewis, the collector of the port of Philadelphia. The lease contained no provision as to the manner in which the building should be used, or defining its strength. About one month after possession was taken under the lease the building fell while goods were being stored for the first time, and while the plaintiff was engaged in his usual occupation of storing goods. In the ruins five other persons, similarly engaged, were buried, two of whom were killed, and the plaintiff's arm was broken and he was otherwise injured. The plaintiff was at that time a day-laborer, employed "to store goods under the new bonding system." The plaintiff showed that the building was intended for the storage of heavy

articles. Lewis testified that the defendant told him of his contemplated improvements, and wished to know whether the custom-house would require them. Lewis replied that he would say nothing to induce him to build, but if after the buildings were constructed they were needed by the custom-house, he would give Godley the preference. Godley asked him if they were needed what kind of stores would be required. Lewis told him that they should need those of the strongest kind, suitable for the storage of iron and steel and hardware and other heavy articles. This conversation was frequently repeated while Godley was erecting the stores. After they were finished Lewis and one Harris made a partial examination, and considering them to be first-class stores, Lewis agreed to rent them. This testimony of Lewis the defendant objected to. Harris, the government store-keeper, testified that he had no doubt that Godley erected the building expecting the government to take it; that he, Harris, had encouraged this hope, and had been consulted by Godley as to the shape of the rooms, and the like. The plaintiff showed that the defendant was a merchant, not an architect or builder, but that he nevertheless superintended the construction, and was aware of the method and plans used in the construction, and that bad materials were used, and elliptic arches used instead of regular arches or solid walls. The defendant was shown to have been cognizant of these defects, and to have spoken with anxiety regarding the arches. The plaintiff alleged that the accident was not caused by any misconduct or misuse of either himself or the lessee. The defendant alleged that in the erection of the building competent workmen were engaged and good materials used; that a defective arch had been removed; that a crack in one of the arches was perceived by Harris when the building was first occupied, who had it stopped up, but expressed confidence in the arch; that the building was erected under the supervision of Harris, a government officer, who advised as to its construction, and with whom the defendant consulted as to the strength and capacity of the building; that the collector examined it, and after the examination the lease was made; that the lease contained no warranty of any kind, and the defendant had no control over the building after the lease was made; and that he had cautioned Harris as to the storing of sugar, requesting him not to pile it more than four boxes high. Verdict was rendered for the plaintiff. The defendant assigned error to the admission in evidence of the conversations between Lewis and the defendant, before the building was in course of construction,

relative to the uses to which it was designed and the degree of strength necessary, and to the charge to the jury.

Lex and Williams, for the plaintiff in error.

Gosler and Porter, for the defendant in error.

By Court, WOODWARD, J. We have carefully considered the several errors assigned in this cause, and all that has been urged in support of them, and we have found no ground for reversing the judgment. The evidence of Mr. Lewis was properly admitted; and the cause was put to the jury by the learned judge who presided at the trial in a manner quite as favorable to the plaintiff in error as he had any right to claim.

We care not how distinctly it is understood that when a man erects a building to rent the law requires a reasonable share of that regard for human life which he is sure to manifest when he builds for his own inhabitation. If he will build, as is charged and found in this case, "loosely, carelessly, unskillfully, and negligently," and with "insufficient and improper materials," whereby the innocent and unsuspecting are injured, let him respond in damages. He is bound to employ reasonable skill and diligence in the erection of his building, regard being had to the uses and purposes for which it is designed.

The plaintiff in error understood from the first that if the government became his tenant a strong building would be needed, suitable for heavy storage. He built with his eyes open to that object. If after it was finished he knew there were defects in it which unfitted it for the designated purpose, he should have stipulated in his lease against its being used for heavy storage. He omitted his duty in both respects. He did not build a strong storehouse; and he did not forbid heavy storage. He must bear the consequences of his neglect, and he has reason to felicitate himself that they are not more serious.

The judgment is affirmed.

LIABILITY OF OWNERS OF PREMISES DEFECTIVELY CONSTRUCTED OR OUT OF REPAIR FOR INJURIES RESULTING THEREFROM.

LIABILITY OF LANDLORD AND TENANT RESPECTIVELY for nuisances or injuries from failure to repair is treated in the note to *City of Lowell v. Spaulding*, 50 Am. Dec. 776-783, and the subject is treated under the heads of: 1. The liability of the lessor to the tenant; 2. The liability of the lessor to strangers; 3. The liability of the tenant to strangers. Upon page 781 of that note it is said that the lessor will be liable "where a house or other erection is so defectively constructed, or is in such a ruinous condition at the time of the demise, that it subsequently falls upon and injures adjacent property, or persons or goods of strangers lawfully therein," and to this point the principal

case, together with others, is cited. The case of *Reichenbacher v. Palmeyer*, 8 Ill. App. 217, is a case quite similar to the principal case. It was there held that the owner of building in a ruinous and dangerous condition is liable to an employee of his tenant for injuries sustained by reason of the condition of the building. A landlord letting a building to different tenants must keep the staircase in repair, and is liable for injuries suffered by a tenant from the defectiveness of the staircase. The fact that the tenant knew of the dangerous condition of the staircase is not conclusive evidence that he did not use due care: *Looney v. McLean*, 129 Mass. 33; S. C., 37 Am. Rep. 295. If the occupant of the building fail to use due care, he can not recover for injuries resulting from the bursting of a water pipe. Where the contributory negligence is palpable, it may become a pure question of law: *Rudolph v. Fuchs*, 44 How. Pr. 155; *Brown v. Elliott*, 45 Id. 182. Persons who hold a fair, and erect structures for the use of their patrons, are liable for injuries received by the occupants from the breaking down or falling of such structures, if caused by the negligent and unskillful manner of their construction: *Latham v. Roach*, 72 Ill. 179. An owner of a tenement-house who neglects to comply with a statute requiring him to provide fire-escapes is liable to any occupant who suffers injury for want of one: *Willy v. Mulledy*, 6 Abb. N. C. 97. When the tenant is bound to repair, the landlord is not responsible for any injuries, unless the defect existed at the beginning of the tenancy: *Union etc. Co. v. Lindsay*, 10 Ill. App. 583. So the landlord is not liable for damages incurred from a defective sidewalk in front of the leased premises, unless he has expressly agreed with the tenant to keep the sidewalk in repair, but the tenant is liable: *City of Lowell v. Spaulding*, 50 Am. Dec. 775; and see the note to this case referred to above, which discusses this subject at length. Where the owner of leased premises covenants to repair, he will be liable to owners and occupants of adjoining land for injuries resulting from a fall of the defective structure: *Benson v. Suarez*, 19 Abb. Pr. 61; S. C., 43 Barb. 408; *Davenport v. Ruckman*, 10 Bosw. 20; S. C., 16 Abb. Pr. 341; *Anderson v. Dickie*, 26 How. Pr. 105; *Cannavan v. Concklin*, 1 Abb. Pr., N. S., 271. But a landlord who has covenanted to repair, but who has not been notified by the tenant to do so, is not liable for injuries sustained from the defective condition of the premises by a stranger who enters at the invitation of the tenant: *Ploen v. Staff*, 9 Mo. App. 309. One who lets his hall for public purposes holds out to the public that it is safe, and he is bound to exercise proper care in providing safe arrangements for entrance and departure to those invited thereto. And one may recover for injuries resulting from his stepping off an unguarded piazza, the door leading to which occupied the same relative position to an upper flight of stairs as did the street door to the lower flight: *Camp v. Wood*, 76 N. Y. 92. But where a building containing a temporary gallery was let to a person who allowed the gallery to be overcrowded and filled with a boisterous and excited crowd, and during their stamping and moving about the gallery gave way, the lessor and owner is not liable to a person injured thereby, for no negligence is attributable to him: *Edwards v. New York etc. R. R. Co.*, 25 Hun, 634.

GENERAL LIABILITY OF OWNERS TO THIRD PERSONS.—It is the duty of owners of property to keep it in such a condition that persons who are lawfully on the premises shall not be injured: *Baker v. Dyne*, 58 Barb. 438. The owner must exhibit the care and foresight of a prudent man in erecting his structures and keeping them in repair, so that those who are lawfully on the premises shall not be injured by defects therein. "While a man has a right to follow his own tastes and inclinations as to the style and character of the

building that he will erect upon his own land, yet he has no right to erect and maintain there a building that is dangerous by reason of the materials used in or the manner of its construction, or that is inherently weak or in a ruinous condition, and liable to fall and do an injury to an adjoining owner or the public. Such a building on a public street is a public nuisance, and is a private nuisance to those owning property adjoining it; and if the building falls and inflicts injury upon the adjoining owners or their property, or to any one who is lawfully in its vicinity, the owner is liable for all the consequences that ensue therefrom." Wood on Nuisances, sec. 109; *Benson v. Suarez*, 28 How. Pr. 511; *Ferguson v. Selma*, 43 Ala. 398; *Chute v. State*, 19 Minn. 27; *Payne v. Rogers*, 2 H. Black. 350; *Mullen v. St. John*, 57 N. Y. 567; *Tenant v. Goldwin*, 2 Ld. Raym. 1093; *Anonymous*, 11 Mod. 8. Erecting and maintaining an insecure building is a nuisance: *Gagg v. Vetter*, 41 Ind. 228. And a house which is not in itself a nuisance may become so by negligence in keeping it: *State v. Purse*, 4 McCord, 472. The fact that the building was defective, thereby causing injury, raises a presumption of the owner's negligence: *Mullen v. St. John*, 57 N. Y. 567. But this presumption is rebutted where the injury is proved to have resulted from *vis major* or from the unanticipated act of a third person: *Mahoney v. Libbey*, 123 Mass. 20. No averment need be made in the declaration, either that the plaintiff was ignorant of the defect or that it was known to the defendant. Proof of knowledge on the part of the plaintiff should come from the defendant, as it is a matter of contributory negligence; and knowledge on the part of the defendant, being an ingredient of negligence, may be proved under the general allegation of negligence: *Knaresborough v. Belcher etc. Mining Co.*, 3 Saw. 446. The owners of a platform built over a canal of their construction are bound to keep it in repair, and are not relieved from liability for injuries occurring on a part of the platform constructed by a subtenant: *Nash v. Minneapolis Mill Co.*, 24 Minn. 501. A liberty-pole erected according to the custom of a city, and safely and securely, is not a nuisance: *Alleghany v. Zimmerman*, 95 Pa. St. 287; S. C., 40 Am. Rep. 649.

LIABILITY TO VISITORS AND PERSONS ENTERING UNDER INVITATION.—When persons enter the house of another for business purposes, there is an implied contract on the part of that other that his place of business is suitable for the transaction of his business, and if unsuitable and injury result, he will be liable. He is bound to be as diligent as a good business man engaged in his line of business would be in providing a safe place of business for those transacting business with him: Wharton on Negligence, secs. 351, 652-657, 821, 829. A different and less liability obtains when the injured person enters upon the owner's invitation. In that case the relation is non-contractual. The visitor if he chooses to enter engages to risk the same dangers that the owner who invites him is accustomed to undergo. And the owner in effect offers him merely the privileges of his house as it is, and engages no more than that his visitor shall be exposed to no more dangers than a visitor visiting such a house is ordinarily exposed to: Wharton on Negligence, secs. 350, 824 a, 825, 826. But the owner would be liable even to a visitor for injuries resulting from hidden dangers of which the owner was aware, but of which he did not inform his visitor. Such dangers as these are open trap-doors, spring-guns, or like concealed sources of danger: *Id.*; *Southcote v. Stanley*, 1 H. & N. 247; *Smith v. Dock Co.*, L. R., 3 C. P., 326; *Welfare v. R. R.*, L. R., 4 Q. B., 693; *Bolch v. Smith*, 7 H. & N. 738; *Pierce v. Whitcomb*, 48 Vt. 127; *Elliott v. Pray*, 10 Allen, 378; *Pittsburgh R. R. v. Bingham*, 29 Ohio St. 364; *Stroub v. Loderer*, 53 Mo. 38; *Louisville etc. R. R.*

v. *Murphy*, 9 Bush, 522. In *Pittsburgh R. R. Co. v. Bingham*, 29 Ohio St. 364, it is said that the owner is not liable for defects in construction causing injury, when the injured party is within the building by mere permission, and not for the purpose of transacting any business. The visitor can not recover for injuries resulting from mere omissions upon the part of the owner if the danger is not concealed. Thus in *Southcot v. Stanley*, 1 H. & N. 247, the plaintiff attempted to open a door, from which, being as alleged in an unsafe condition through the negligence of the owner, a large piece of glass fell, injuring the plaintiff. This was held not to constitute a cause of action. So where one is invited to enter a building for a particular purpose, the access and egress must be safe, but if he wander about in the dark through mere curiosity and is injured by the building being out of repair, he can not recover from the owner: *Pierce v. Whitcomb*, 48 Vt. 127. A portion of a wharf was rented to a mercantile firm by the agent of the corporation which owned the wharf, the agent to make all the needful repairs. During business hours the wharf was left open for the passage of persons having business with vessels lying at the wharf. While a person was engaged in carrying a trunk to a vessel he stepped into a hole in the wharf, which had long been worn through, and was severely injured. It was held in this case that the person injured was not a mere licensee; that the corporation was liable on the principle of *respondeat superior*, and the agent was liable for personal negligence, but these liabilities of principal and agent were not joint: *Campbell v. Portland Sugar Co.*, 62 Me. 552. The owner is not an insurer, however. If he has been diligent and careful, he has done all that the law requires of him, providing his structure is not *per se* a nuisance. Therefore, due care being used in erection and maintenance of the building the owner is not liable for occult defects where he has no reason to suppose it defective: *Walden v. Finch*, 70 Pa. St. 460; *Schell v. Second Nat. Bank*, 14 Minn. 43. So where injury results from *vis major* or from the unanticipated act of a third person, the presumption of negligence from the fact that the building proves defective is rebutted: *Mahoney v. Libbey*, 123 Mass. 20. Speaking of the owner's liability to visitors or guests, Wharton says, in his work on negligence: "Those latent defects which are incident to the ordinary wear and tear of houses, or which spring from the bad faith or negligence of the builders and of which the owner has no notice, are among those casualties which no man can avoid without the exercise of that extraordinary care and vigilance which the law does not impose," and will not render him liable to visitors or guests: Wharton on Negligence, sec. 825. A religious society is liable to one invited to its house of worship for injuries suffered from the dangerous condition of the premises: *Davis v. Central Congregational Society*, 129 Mass. 367; S. C., 37 Am. Rep. 368.

Injuries and Nuisances to Passers-by.—"Any act of an individual, although performed upon his own soil, that detracts from the safety of travelers upon a public street or highway is a nuisance, and actionable or indictable as such:" Wood on Nuisances, 128. The failure to perform the duty of keeping a building adjoining a street safe, and resulting damage, are *prima facie* evidence of negligence. The owner is bound to observe reasonable care: *Vincett v. Cook*, 6 Thomp. & C. 562; S. C., 4 Hun, 318; *Mullen v. St. John*, 57 N. Y. 567. A building or a brick wall projecting over a street or adjoining lot is a nuisance, though it be safe: *Garland v. Towne*, 55 N. H. 55; *Meyer v. Metzler*, 51 Cal. 142. And permitting the walls of a burned building to stand on a public street in a dangerous condition renders the owner liable as for a nuisance: *Rector etc. v. Buckhout*, 3 Hill (N. Y.), 193. But it was held in *Jenks*

v. *Williams*, 115 Mass. 217, that the projection of a bay-window over a street in violation of law was not necessarily a nuisance. The cornice of a building which projects over a sidewalk in a city, and which is being constructed in such a manner as to be dangerous to persons using the sidewalk, is a nuisance: *Grove v. City of Fort Wayne*, 45 Ind. 429. While passing the defendant's premises the plaintiff was injured by a piece of wood falling upon him. There was evidence to show that the missile fell from the defendant's premises. If this was a fact, it was *prima facie* proof of negligence on the part of the defendant: *Clare v. National City Bank*, 1 Sweeny, 539. So one who, while lawfully passing along a street, is injured by the falling of a brick caused by the dilapidated condition of a house has a cause of action against the owner of the house for the damages suffered: *Murray v. McShane*, 52 Md. 217; S. C., 36 Am. Rep. 367. Where a portion of a chimney falls through the unauthorized act of a third person, the chimney being securely built, the owner will not be liable; but if the owner permit a chimney to remain in an insecure condition after it has been rendered so by the unlawful act of a third person, and an injury results from its fall, he is liable, for it is his duty to keep it safe: *Scullin v. Dolan*, 4 Daly, 163; *Gray v. Boston Gas-light Co.*, 114 Mass. 149.

No Liability to Trespassers.—The duty of the owners of property to keep it in a safe condition by keeping it in repair does not in general extend to those who are upon the premises without right or permission: *Baker v. Byrne*, 58 Barb. 438; *Lary v. Cleveland etc. R. Co.*, 78 Ind. 323; S. C., 41 Am. Rep. 572. But though the owner of private grounds is under no obligation to keep them safe for the benefit of trespassers, yet where such trespassers are children, who from the neighborhood and exposed position of the grounds are likely to enter upon them, reasonable precautions should be taken to prevent the occurrence of accidents: *Coppner v. Pennsylvania Co.*, 12 Ill. App. 600. And the trespasser may recover for injuries resulting from direct negligence, such as from open trap-doors and spring-guns: Wharton on Negligence, sec. 348; *State v. Moore*, 31 Conn. 479; *Gray v. Coombs*, 7 J. J. Marsh. 478.

Liability for Negligence of Contractor.—For injuries resulting during construction from defects therein, the contractor who has engaged to perform the work will be liable, unless the owner has been negligent in employing a negligent and unsuitable contractor: *Clare v. National City Bank*, 40 N. Y. Superior Ct. 104. The contractor who engages to raise a house, and not the owner, will be liable for injuries caused to the house of an adjoining owner by the fall of the house while being raised, if the contractor was not unskillful or unsuitable to do the work, and the work created no nuisance; otherwise the owner would be liable: *Connors v. Hennessey*, 112 Mass. 96. See *Gardner v. Bennett*, 38 N. Y. Superior Ct. 197. A building was erected with insufficient strength through the negligence of the contractor. But though the contractor was a member of the corporation employing him, his knowledge of the defect was not imputable to the corporation: *Dillon v. Sixth Avenue R. R. Co.*, 48 Id. 283. But one is liable for damages caused from a negligently constructed connection with the sewer, though the work had been done by a contractor: *Sturges v. Theological Education Society*, 130 Mass. 414; S. C., 39 Am. Rep. 463. An employer is not liable to one of his agents or servants for the negligence of another of his agents or servants, unless he was at fault in the selection of the agent, or in some other respect. So the owner of the building is not liable for injury done to one contractor's work from the fall of another contractor's work, due to its unskillful construction: *Treadwell v. Mayor etc. of N. Y.*, 1 Daly, 123. The liability of

the employer for the acts of a contractor is considered in the note to *Stone v. Cheshire R. R. Corporation*, 51 Am. Dec. 200-206.

Liability of Municipal Corporations.—In New York, the board of education in certain school districts are created bodies corporate, and as such are liable for injuries caused by a school-house being out of repair, but the members of the board are not liable in their individual capacity. A judgment against the corporation would be satisfied out of the corporate funds, and the funds the corporation is empowered to raise: *Bassett v. Fish*, 75 N. Y. 303, 312, 313. In *Lane v. District Township of Woodbury*, 58 Iowa, 462, the plaintiff had no remedy against a school district for personal injuries sustained because of the negligent construction of a school-building, or failure to repair it. The school district is a public corporation, and not liable in this respect. This case followed *Kincaid v. Hardin County*, 53 Id. 430, which held the county not liable for a defectively constructed court-house. Though the city corporation own a school-house, if they do not employ the contractors who engage to build it, and have no power to do so, but the contract is made under the approval of the board of education, the city corporation will not be liable for the negligence of the contractors. The relation of master and servant does not exist: *Treadwell v. Mayor etc. of N. Y.*, 1 Daly, 123.

LIABILITY OF OWNERS OF BRIDGES.—A bridge company must construct its works with care and caution, and look after their condition and safety with ordinary vigilance at least, and is liable to all persons who are injured by reason of a breach of such duty. Ordinary diligence is the measure of the liability of a bridge proprietor. Beyond this he is not an insurer: *Frankfort Bridge Co. v. Williams*, 35 Am. Dec. 155; *Stokes v. Tift*, 64 Ga. 312; S. C., 37 Am. Rep. 75; *Beecher v. Derby Bridge etc. Co.*, 24 Conn. 491. The belief that the bridge was safe will not relieve the owners from liability. Their negligence, however, must be averred: *Frankfort Bridge Co. v. Williams*, 35 Am. Dec. 155. Ordinary diligence merely is requisite, and a bridge company is not liable for injuries to a foot-passenger occurring before nine o'clock in the morning, and occasioned by the freezing of rain that had fallen on the sidewalk during the previous night: *Evers v. Hudson River Bridge Co.*, 13 Hun, 144. But it is the duty of the owner of a bridge to keep it in repair; and if it be out of repair, and one falls from it, the owner will be liable for the injuries suffered, and the burden of proving contributory negligence will be upon the owner: *Hays v. Gallagher*, 72 Pa. St. 136. A bridge corporation is liable for an injury occasioned to the horse of a passenger over such bridge by defects in the way leading thereto from the public highway, which it has adopted as a part of such bridge, where it is required by statute to keep the bridge in repair; and the measure of damages will be not merely the value of the horse, but moneys prudently expended in attempting to cure him: *Watson v. Proprietors*, 31 Am. Dec. 49. In an action to recover damages for an injury to the plaintiff's horse, occasioned by a defect in the floor of the defendant's bridge, it was not erroneous to instruct that the defendants were not liable, unless there was culpable neglect on their part in allowing the bridge to be unsafe and out of repair; and if they were thus liable, the jury, in estimating damages, were not necessarily confined to the exact deterioration in value of the plaintiff's horse caused by the injury, but might take into consideration the fact that the plaintiff had been put to the necessity of seeking redress in court, although they should not consider taxable costs: *Beecher v. Derby Bridge etc. Co.*, 24 Conn. 491. One injured by a defect in a private bridge used by the public may recover from the owner who knew it

to be unsafe: *Campbell v. Boyd*, 88 N. C. 129; S. C., 43 Am. Rep. 740. But see *Gautret v. Egerton*, L. R., 2 C. P., 371. But the owner of a private bridge not used by the public is not liable for injuries caused by defects therein, unless the person injured had a special right to pass over it: *Louisville etc. R. R. v. Murphy*, 9 Bush, 522. See also *Gautret v. Egerton*, L. R., 2 C. P., 371. The failure of the owner of land to keep in repair a bridge erected by him over a ditch which he dug through a highway renders him answerable, irrespective of his negligence to any person who, not being guilty of gross negligence, is injured by the bridge: *Dygert v. Schenck*, 35 Am. Dec. 575. Had it been built across a natural stream, and dedicated to public use, the public would have been liable for its repair. The board of chosen freeholders, whose duty by statute is to keep bridges in repair, is liable for defects in a bridge, but they were held not to be liable to a civil suit by a private person for damages from a defect in the bridge, but the remedy was by presentment or indictment: *Freeholders of Sussex v. Strader*, Id. 530. The worthless or decayed condition of a public bridge, or the peril attending its crossing, will not authorize its destruction or injury by one not suffering particular annoyance or injury: *Owens v. State*, 52 Ala. 400. But one whose duty it is to repair a bridge, but who does not do so, is liable to indictment as for a nuisance: 7 Bac. Abr. 232, B.

Contributory Negligence.—Where a bridge becomes defective by the natural decay of its timbers, and the danger is not open and visible to all, the owners who keep it open and continue to take toll are liable, although they notified a person who was injured not to try to pass over: *Randall v. Proprietors*, 25 Am. Dec. 453. See *Stokes v. Tift*, 64 Ga. 312; S. C., 37 Am. Rep. 75. But one who in crossing an unsafe bridge is injured by a fall from it can not recover if he was warned of the condition of the bridge, and directed to another bridge near by which was safe: *Wood v. Village of Andes*, 11 Hun, 543. And one who has actual knowledge of the unsafety of the bridge, or reasonable ground to apprehend its condition, can not recover if injured while attempting to cross it: *Folsom v. Underhill*, 36 Vt. 580; *Earlville v. Carter*, 6 Ill. App. 421. The employee of a bridge company, who knew of the unsafe condition of the bridge but did not inform the owners, who were ignorant of the condition of the structure, is guilty of contributory negligence, and his representatives can not recover if he is killed by reason of these defects: *Mansfield Coal etc. Co. v. McEnery*, 91 Pa. St. 185; S. C., 36 Am. Rep. 662. Where a blind person walked off a bridge which was defective in wanting a rail, it can not be said, as a matter of law, that he was contributorily negligent, but this is a question for the jury to consider, taking into account his familiarity with the road and his ability to pass the defect without accident, and also his attempting to cross the bridge without a guide: *Sleeper v. Sandown*, 52 N. H. 244; see *Gonzales v. N. Y. & Harlem R. R. Co.*, 33 N. Y. Superior Ct. 57; *Staples v. Canton*, 69 Mo. 592. No action lies against a city which is bound to keep a bridge in repair to recover damages suffered by reason of a defect therein by an inhabitant of the city, who at the time the injury was received was driving across the same at a rate of speed faster than a walk, contrary to a city ordinance, although he was ignorant of the existence of the ordinance: *Heland v. Lowell*, 3 Allen, 407. The general principles of contributory negligence are laid down in the note to *Freer v. Cameron*, 55 Am. Dec. 666-678.

THE PRINCIPAL CASE IS CITED in *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 151, to the point that the rule of *respondeat superior* applies only when the relation of master and servant exists, not when a contractor is employed to per-

form certain work. The principal case was affirmed and followed in *Carson v. Godley*, 26 Id. 115; and the principal case and *Carson v. Godley* are cited in *P. F. W. & C. R'y Co. v. Gilleland*, 56 Id. 451, to the point of the liability of the owner of a defective warehouse to an employee of his lessee. To the same point it is cited in *Reichenbacher v. Pahmeyer*, 8 Ill. App. 219, which holds to much the same effect as the principal case. *Purcell v. English*, 81 Ind. 41, was a case where a tenant sought to recover damages of the landlord for injuries suffered from ice upon a staircase leading to the rented house. It was held that the tenant could not recover in the absence of a covenant to keep the premises in a safe condition; and the principal case was distinguished as being an action by a stranger against the landlord, and therefore not in point.

KUNTZMAN v. WEAVER.

[20 PENNSYLVANIA STATE, 422.]

IN ACTION ON WARRANTY OF SOUNDNESS OF HORSE, TESTIMONY AS TO SOUNDNESS OF HORSE by witnesses who saw the horse about the time of the sale, and especially while in the possession of the purchaser, is competent to go to the jury upon that question.

UPON BREACH OF WARRANTY OF SOUNDNESS OF HORSE, purchaser may return horse and recover price paid, with interest from the time of the return.

ACTION by Weaver against Kuntzman, upon an alleged warranty of a horse sold to the plaintiff by the defendant. The plaintiff returned the horse, and sought to recover the purchase price and interest. The plaintiff introduced evidence tending to prove that the horse was spavined, and that Kuntzman had warranted the soundness of the horse. The fourth exception on the part of the defendant and plaintiff in error was to the rejection of evidence that the horse was not spavined while in Weaver's stable, some two months after the sale. The fifth exception was to the rejection of evidence that the horse never went lame after Weaver returned him. The seventh and eighth were to the rejection of evidence that the horse had no spavin, and was not lame at the time he was returned. There were several other exceptions upon which error was assigned; and error was also assigned to the charge of the court that if Kuntzman warranted the horse, and he proved to be unsound, the purchaser might return him and recover the price paid, with interest from the time of the return. Verdict was for the plaintiff, and the defendant brought error.

Reese and Porter, for the plaintiff in error.

Bridges and King, for the defendant in error.

By Court, WOODWARD, J. In rejecting the evidence in the defendant's fourth, fifth, seventh, and eighth bills of exception we think the court were clearly in error.

This was an action on the warranty of the soundness of a horse. The breach of the warranty consisted in an alleged spavin. The plaintiff alleged a spavin, and the defendant denied it. The testimony of witnesses who saw the horse about the time of the sale, and especially whilst in Weaver's possession, was competent to go to the jury on that question. The defendant offered to prove by these witnesses that the horse was not spavined and did not go lame. Their opportunities and capacities to form correct opinions, and the consequent value of their testimony, were for the jury to estimate; but it is difficult to conceive how any evidence could be more pertinent to the issue.

We see no other errors in this record; but for these the judgment is reversed, and a *venire de novo* is awarded.

WHAT DEFECTS AMOUNT TO BREACH OF WARRANTY OF SOUNDNESS: See this subject extensively discussed in the note to *Roberts v. Jenkins*, 53 Am. Dec. 173-179.

MEASURE OF DAMAGES IN ACTION FOR BREACH OF WARRANTY OF SOUNDNESS: See note to *Cary v. Gruman*, 40 Am. Dec. 303, where the rule is stated to be the difference between the actual value and the value as warranted. To the same effect is *Voorhees v. Earl*, 38 Id. 588. Damages for the keeping of a horse by a purchaser before offering to return him can not be recovered in an action for a false affirmation as to the soundness of the animal: *West v. Anderson*, 21 Id. 737.

WETHERILL v. NEILSON.

[20 PENNSYLVANIA STATE, 448.]

PURCHASER TAKES RISK OF QUALITY OF ARTICLE PURCHASED, unless it be warranted or he be fraudulently misled as to it.

MERE REPRESENTATIONS AS TO QUALITY OF GOODS SOLD do not constitute a warranty.

EVIDENCE OF SPECIAL CUSTOM AMONG CERTAIN TRADERS, making common words of representation words of warranty, is not admissible.

ASSUMPSIT on a promissory note made by Wetherill & Co., the defendants, and admitted to have been given to the plaintiff Neilson in payment for a quantity of soda-ash purchased by the defendants from the plaintiff. At the trial, in behalf of the defendants, William Trimble, a merchandise broker, testified that he had negotiated the sale of the soda-ash; that Neilson

had given him a specification of the soda-ash, representing it to be Johnson's brand and of forty-eight degrees strength; and that he so represented the article to the defendants, and that he was authorized by Neilson to do so. Testimony to the effect that the soda-ash in question was below forty-eight per cent test and not merchantable, and that the defendants offered to return the goods to the plaintiff as soon as its deficient quality was discovered, was not admitted by the court, and the defendants excepted. The defendants offered to prove a custom of trade at Philadelphia, under which soda-ash was sold upon the representation of the seller as to the percentage of alkali in it, and without sample or warranty. The court refused to admit this evidence, and the defendants excepted. Verdict was rendered for the plaintiff, and the defendants brought error.

Northrop and Campbell, for the plaintiffs in error.

Guillou, for the defendant in error.

By Court, LOWRIE, J. There is no difference in principle between this case and the numerous ones referred to in the argument, all establishing the rule that the purchaser takes the risk of the quality of the article purchased, unless it be warranted or he be fraudulently misled as to it. If mere representations were to be treated as part of this contract, it is not easy to see why they should not be so as to all other contracts. And if they were, then the law would foster a spirit of litigation by encouraging every man who is disappointed in the advantages expected from a bargain to drown his sorrows in the excitement of an action at law. The law repairs broken contracts, but it does not attempt to satisfy mere expectations. It is especially important that this should be the rule as to representations of the quality of goods sold; for there is nothing on which people are more apt to differ, and nothing on which they are less apt to trust each other.

There is nothing in the representations of the agent, and what is more to the purpose, nothing in the authority given to him, that would justify a finding of either warranty or fraud, and therefore, the court was not wrong in saying that the defense had failed. None of the offers of evidence tended to overcome this difficulty, and they were therefore properly rejected.

As to the offer to prove a special custom in Philadelphia as to the special article of soda, if it means anything at all, it means that when people in Philadelphia are selling soda, com-

mon English words of representation become words of warranty. It must be conceded that such evidence has been admitted: *Snowden v. Warder*, 3 Rawle, 101; but never without serious doubt, and we have found ourselves unable to follow the example: See *Coxe v. Heisley*, 19 Pa. St. 243. The courts must be allowed to understand common English without the aid of witnesses. The law is, that mere representation does not constitute a warranty. If we admit evidence of this special custom, we allow the law to be changed by the testimony of witnesses, or by the soda dealers of Philadelphia. If parties mean to warrant, it is very easy for them to say so. If we imply a warranty from such special customs, it is very easy to see that, theoretically, all contracts are *prima facie* undefined; for we can not know what special customs will be needed to aid in their interpretation. Morality could gain nothing by the admission of such a principle into the law. Such evidence would affect written as well as verbal contracts. The custom, if respected at all, must be regarded as part of the contract, whether written or verbal, and then their uncertainty is apparent.

Judgment affirmed.

WARRANTY OF QUALITY NOT IMPLIED IN EXECUTED SALES OF GOODS: *Beirne v. Dord*, 55 Am. Dec. 321; *Getty v. Rountree*, 54 Id. 138, and note 145; *Dickson v. Jordan*, 53 Id. 403, and note citing prior cases. So where goods are sold on inspection: *Carson v. Baillie*, 57 Id. 659.

CUSTOM IN SALE OF PARTICULAR CLASS OF GOODS CONTROLLING GENERAL RULE OF LAW IS INADMISSIBLE: *Beirne v. Dord*, 55 Am. Dec. 321, and note 329, collecting the prior cases in this series. The principal case is cited to the point that a usage of trade can not make a warranty out of what would not otherwise be one, in *Dickinson v. Gay*, 7 Allen, 32; *Barnard v. Kellogg*, 10 Wall. 393.

REPRESENTATIONS DO NOT CONSTITUTE WARRANTY: *McFarland v. Newman*, 34 Am. Dec. 497, and note citing prior cases 503; at least, as regards matters of opinion, for it is held that positive representations of matters of facts do constitute a warranty: *Towell v. Gatewood*, 33 Id. 437; *Kinley v. Fitzpatrick*, 34 Id. 108, and cases cited in the note. The word "warrant" is not necessary: Id. Vendee must prove either fraud or warranty in action for price of goods in order to defend on the ground of the bad quality of the goods. The principal case is cited to this effect in *Heilbruner v. Wayte*, 51 Pa. St. 261.

REIMER v. STUBER.

[20 PENNSYLVANIA STATE, 453.]

PRESUMPTION CREATED BY LAPSE OF TIME IN FAVOR OF EASEMENT is not weakened by the mere inattention or ignorance of the owner of the land respecting the fact that an easement in it is used by another.

NO PRESUMPTION OF GRANT ARISES FROM ADVERSE ENJOYMENT OF EASEMENT against minor or *feme covert*; but a second disability added to one which existed when the adverse enjoyment first began is always disregarded. So a coverture which took place during infancy is not taken into account after the infancy has ended.

RIGHT OF WAY OVER UNINCLOSED WOODLAND can be acquired by user for twenty-one years.

EXCEPTIONS WILL NOT BE CONSIDERED UNLESS SET OUT IN PAPER-BOOK as the rule of court requires.

CASE for damages caused by obstructing a private way. Stuber, the plaintiff, claimed the right of way by user. Reimer, the defendant, was a tenant of the owner of the land, and obstructed the way by putting a fence across it by direction of the owner of the land, which was uninclosed woodland. The rule of court referred to in the opinion was to the effect that each error assigned should be separately specified, and that no specification should embrace more than one point or one bill of exceptions, or raise more than one distinct question. There were four assignments for error: the first assigned error to evidence "as mentioned in the first and second bills of exceptions;" the second "as mentioned in the third, fourth, and fifth bills of exceptions;" and the third referred to "the sixth and seventh bills of exceptions." The case is otherwise sufficiently stated in the opinion.

Porter, for the plaintiff in error.

Reeder, for the defendant in error.

By Court, BLACK, C. J. This was an action for disturbing the plaintiff's right of way over land of which the defendant was in possession. The plaintiff's title to the way was founded on user for upwards of twenty-one years, and some evidence was given which showed that he had enjoyed it for more than forty-five years. The owner of the land was a woman; she died five years before suit brought; was married thirty-five years before her death; was a minor at the time of her marriage; had seldom visited the place, and never the woodland through which the way ran.

1. The mere inattention of the owner of land to the fact that

an easement in it is used by another does not weaken the force of the presumption which the lapse of time creates. Such presumptions, like the statutes of limitation, will work out their purpose, though the party affected by them should close his eyes. It would not do to say that the mere ignorance of the owner repelled the presumption of a grant.

2. Where a tenant for years or for life grants an easement, such grant is of no force or validity against the reversioner or remainderman. So, if the tenant of a particular estate suffer an easement to be enjoyed for twenty-one years, it raises no presumption of a grant by him in remainder or reversion. But here the land was occupied by tenants from year to year. The owner of the fee was in possession, and had the right to bring suit every year. The case is wholly different from that of one who is out of possession during the whole of the time.

3. No presumption of a grant arises from the adverse enjoyment of an easement against a minor or *feme covert*. The presumption operates in strict analogy to the statute of limitations, which recognizes the disabilities of infancy and coverture as sufficient excuses for inaction. But a second disability added to one which existed when the adverse enjoyment first began is always disregarded. Thus a coverture which took place during infancy is not taken into account after the infancy has ended. In this case the marriage of Mrs. Innes was forty-five years before suit brought. Her age is not given, but it would be absurd to say that she was not out of her minority more than twenty-one years before this suit; for that would require us to believe that she was not twenty-one years old until after she was twenty-four years married.

4. Another point is, whether one can acquire a right of way by user of uninclosed woodland for twenty-one years. This question was solemnly settled in *Worrall v. Rhoads*, 2 Whart. 427 [30 Am. Dec. 274]. Believing it to be our duty to leave the law in as good condition as we found it, we refuse to disturb that case, and therefore rule this point also against the plaintiff in error.

5. Our opinion is that none of the exceptions to evidence can be sustained, for the reason that the ruling of the judge below was right. But instead of discussing them at length, we will dismiss them at once, by saying that they are not set out in the paper-book as the rule of court requires.

Judgment affirmed.

TWENTY YEARS' UNINTERRUPTED USER OF EASEMENT IS PRIMA FACIE EVIDENCE of right to such easement: *French v. Marstin*, 57 Am. Dec. 294. *Stuyvesant v. Woodruff*, 47 Id. 156, and cases cited in the note; *Kilburn v. Adams*, 39 Id. 754; *Turnbull v. Rivers*, 15 Id. 622; *Gayetty v. Bethune*, 7 Id. 188. Twenty-one years: *Worrall v. Rhoads*, 30 Id. 274. More than twenty-one years: *Hill v. Crosby*, 13 Id. 448. Forty years: *Melvin v. Whiting*, 20 Id. 524.

UNINCLOSED LANDS, RIGHTS OF WAY OVER: See *Kilburn v. Adams*, 39 Am. Dec. 754, and prior cases cited in the note 757.

DISABILITIES OF INFANCY AND COVERTURE AS AFFECTING STATUTE OF LIMITATIONS: See note to *Moore v. Armstrong*, 36 Am. Dec. 68-71. The principal case is cited in *Edson v. Munsell*, 10 Allen, 566, to the point that a prescription can not be interrupted by a disability which does not come into existence until after the time has begun to run.

THE PRINCIPAL CASE WAS DISTINGUISHED in *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 41. In that case it was held that in Pennsylvania there could be no prescriptive right of several and exclusive fishery upon another's property, and the principal case was distinguished as being a case of a plain, dominant, and servient tenement.

PETERS v. RYLANDS.

[20 PENNSYLVANIA STATE, 497.]

ONE DOLLAR PAID BY FATHER FOR HIMSELF AND MINOR DAUGHTER is sufficient consideration for contract of carriage, in the performance of which the daughter is injured, though fifty cents for her fare were demanded and refused.

CARRIERS OF PASSENGERS ON RAILROADS ARE NOT INSURERS of the lives and limbs of their passengers, but the implied contract binds them to exercise the highest degree of care and prudence, and makes them liable for the slightest neglect.

OWNER OF PASSENGER CARS ENGAGED IN CARRYING PASSENGERS OVER TRACK BELONGING TO STATE, by which also the motive power is furnished, is liable for injuries to a passenger from a collision, though it were caused by the negligence of the engineer who is employed by the state; and if there be a common liability, that of the state can not be enforced by action, and this circumstance does not diminish that of the carrier.

CASE by Susan Rylands, a minor, by her next friend, Thomas Rylands, against Peters and others to recover damages for injuries suffered by her from a collision which occurred while the plaintiff was traveling in the cars of the defendants. The defendants were the owners of cars, and employed them in carrying freight and passengers. These cars were run over a track which belonged to the state of Pennsylvania, which also furnished the motive power, owned the locomotives, and employed

the engineers and firemen. An officer called "state agent" accompanied every train and collected the state tolls charged upon each passenger, and whenever the conductor, the agent of the defendant, desired to stop, he notified this officer, whose duty it was to stop as requested. Two trains left Columbia every day for Philadelphia: one called the accommodation train, and the other the mail or fast train, the latter train leaving about an hour after the former. The mail train usually overtook the accommodation train on the way to Philadelphia, and the latter switched upon a side-track to allow it to pass. Upon the day of the collision the accommodation train reached Downington later than the usual time. There the plaintiff, accompanied by her father and brother, got aboard this train as passengers. Without waiting the arrival of the mail train, the accommodation train left Downington, and also passed Paoli, where there was a stopping place and a turnout. About two miles farther on, at a curve in the road, the front wheels of the engine-tender, for some unexplained reason, got off the track. The speed was slackened, and the conductor ran back to signal the approaching mail train, but the signal was given too late, and the collision took place whereby the plaintiff was injured. The plaintiff and her father were in the rear car, which was used for emigrants and did not belong to the defendants. There was also some testimony as to their being requested to move into a forward car. The other facts appear in the opinion. Verdict for the plaintiff, and error assigned by the defendants.

Gowen and Mallery, for the plaintiffs in error.

Hirst and Hood, for the defendant in error.

By Court, WOODWARD, J. Whether under the circumstances in evidence it was negligence in the engineer and state agent to pass Paoli, after the detention to which the train had been subjected, without turning out and stopping for the mail train to go by, was a question for the jury, was properly submitted to them, and they have found the negligence.

But as this was the negligence of state officers appointed and paid by the state, and as the motive power of the road was exclusively under their control, is the defendant, who is a common carrier of passengers and goods, responsible for it? This is the great question in the cause. We think he is liable.

1. Because there was a contract to carry. It is true, the girl was in the emigrant car, which did not belong to the defendant, though attached to his train, but so were other passengers from

whom the defendant's agent received fare. And though fifty cents for her fare were demanded and refused, yet the one dollar paid by the father for himself and daughter was a sufficient consideration for the contract. As to the alleged direction to leave that car and go into another, the evidence is contradictory, and no point was made in the court below. The jury found the contract, and there was evidence to justify their finding.

2. This was a contract to carry safely, and the tort alleged consists in carrying negligently. Carriers of passengers on railroads are not insurers of the lives and limbs of their passengers, but the implied contract binds them to exercise the highest degree of care and prudence, and makes them liable for the slightest neglect.

3. The parties contracted with a view to the law of the road. The defendant knew very well that the road on which he contracted to carry the plaintiff belonged to the state, and was controlled by the canal commissioners; that the motive power on which he must depend for the performance of his contract was furnished by the state and conducted by her agents, over whom he was to have no control whatever. He obtained the right to carry passengers on this road, and the use of the state's motive power and agents by a contract with the state, and then he contracted with the plaintiff. Had his contract with the plaintiff been drawn out into form, it would have recited, as it necessarily implies, a previous arrangement with the state authorities for the use of their road, their engines, and their agents. As between him and the passenger, these means of transportation become his. *Pro hac vice* the locomotive and the engineer are his engine and engineer, and logically, as well as on the principles of many adjudged cases, he is responsible for their conduct. If in borrowing these means of transportation he has not stipulated for supreme control in himself, or for indemnity against damages, that is his own concern. He holds himself out to the world as furnished with such means of transportation, and invites the confidence of the public in his ability to carry safely. The passenger looks only to him. He does not contract with the commonwealth. He pays his money and risks his life because he has faith in the transporter's capacity to carry him safely. On what principle, then, at all consistent with the actual relations established between the parties, is the passenger to be denied redress for injury resulting from the negligent performance of this contract?

There is nothing in the doctrine of *Laugher v. Pointer*, 5 Barn.

& Cress. 547, nor in any of the cases that have been ruled on the law of master and servant, that applies here. This case is *sui generis*, but it comes much nearer to that class of decisions in which it has been held that several parties engaged in carrying over different portions of the same line of conveyance, each sharing in the profits of the whole route, and of course of each section of it, are all responsible for the faithful discharge of their duty, and liable to respond in damages for any injury which results from the negligence or unskillfulness of any of the proprietors or their servants: *Bostwick v. Champion*, 11 Wend. 571; *Champion v. Bostwick*, 18 Id. 175 [31 Am. Dec. 376]; *Weed v. Schenectady and Saratoga Railroad Co.*, 19 Id. 534. The state as well as the carrier is paid for each passenger transported on the Columbia railroad, which shows their community of interest; and if there be a common liability, that of the state can not be enforced by action, and this circumstance does not diminish that of the carrier. Because they have a common interest, however, and share the profits of transportation, it is apparent that in holding the party before us to answer for the negligence of the state's agents, we do not punish one man for the misfeasance of another's servants. We do no more than apply the principles of law to the relations which the parties have established by their voluntary contracts.

The judgment is affirmed.

LOWRIE, J., dissented.

LIABILITY OF COMMON CARRIERS OF PASSENGERS: See *Laing v. Colder*, 49 Am. Dec. 533; *Stockton v. Frey*, 45 Id. 138; and an extensive note discussing the subject appended to *Ingalls v. Bill*, 43 Id. 355-367.

REASONABLE COMPENSATION, CARRIER BOUND TO CARRY FOR: *Cole v. Goodwin*, 32 Am. Dec. 470; *McGill v. Rowand*, 45 Id. 654.

THOUGH RAILROAD BELONGS TO STATE, BY WHICH ALSO MOTIVE POWER and engineers are furnished, the owners of cars run upon the road are liable for injuries resulting to a third person through the negligence of any of the agencies employed. These agencies are the agencies of the owner and conductor. The principal case is cited to this effect in *Rauch v. Lloyd*, 31 Pa. St. 366; *York & Maryland etc. R. R. Co. v. Winans*, 17 How. 40.

BODINE v. GLADING.

[21 PENNSYLVANIA STATE, 50.]

CONTRACT MUST BE MUTUAL TO ENTITLE PARTY TO DECREE FOR SPECIFIC PERFORMANCE. Both parties must, by the agreement, have a right to compel specific performance.

SPECIFIC PERFORMANCE WILL NOT BE DECREED where the parties themselves have agreed upon the damages for the breach of the contract, or have provided the means by which such damages may be ascertained.

BILL for specific performance of a contract of sale of real estate. The facts are stated in the opinion.

McMurtrie, for the plaintiff in error.

G. W. Biddle and Cadwalader, for the defendant in error.

By Court, **LEWIS, J.** This a bill for the specific performance of a contract for the purchase of real estate, sold at auction, under a written condition of the sale, that "the cash is to be paid within fifteen days from sale, or the property may be resold at the risk and expense of the purchaser." The sale was made on the tenth of April, 1851, and the title was to be "undoubted." Objections were made to the title on the ground of the defective acknowledgment by the wife of a person through whom the title was derived. This objection was afterwards removed by producing evidence of her death. On the twenty-fifth of June, 1851, the vendor addressed a letter to the vendee, requesting the latter to comply with the terms of sale and take the property, and stating that otherwise he would "sell it at the risk and cost of the purchaser." This letter was answered on the twenty-seventh of June, 1851, by one from the purchaser, in which he stated that he "had given up the purchase on account of the defect above alluded to, and must decline holding himself, at this late day, in any way responsible." The court below dismissed the bill, with costs.

To entitle a party to a decree for specific performance, the contract must be mutual. Both parties must, by the agreement, have a right to compel specific performance; otherwise it would follow that the court would decree a specific performance where the party called upon to perform it might be in this situation, that if the agreement was disadvantageous to him he would be liable to the performance, and yet, if advantageous to him, he could not compel a performance: *Lawrenson v. Butler*, 1 Sch. & Lef. 18; 2 Com. Dig. 411; Newlin on Contracts, 153. In the case before us it may be doubted whether the vendee, after the expiration of the time for the payment of the money, had the usual rights of a vendee to enforce specific performance. In general, time is not of the essence of a contract, according to the rule in equity. But can it be supposed that either party intended to be bound by this rule, and to have his hands tied, and the estate locked up for an indefinite period

of time, to be measured by the conscience of the chancellor? See *Benedict v. Lynch*, 1 Johns. Ch. 379 [7 Am. Dec. 484]; Fonbl. 48, note. The law is necessarily modified by the usages of the people; and when it ceases to keep pace with them, it fails of its object, and produces more injury than good. In this age of enterprise, business of every kind moves not only with railroad speed, but, in many instances, with lightning velocity. Commercial transactions would be greatly embarrassed, and the grossest injustice would be done, if the people are prohibited from making their own contracts.

In this case it is not altogether clear that either party had in view any other consequence of a breach of the contract than a resale, and the payment of the difference and the expense of the resale. If the contract was mutual, either party had a right to insist upon a resale after the breach. If the vendor alone had that right, the want of mutuality would seem to preclude him from asking specific performance. Where the contract itself has assessed the damages which the party is to pay upon his doing or omitting to do a particular act which he has covenanted to abstain from or perform, equity will not interfere either to prevent or to enforce the act in question, or to restrain the recovery of the damages: *Woodward v. Gyles*, 2 Vern. 119; Fonbl. 142, note; *Rolfe v. Peterson*, 2 Bro. P. C. 436; Newlin on Contracts, 313. What is the difference between an agreement assessing the damages and one providing the means of assessing them? The foundation of the chancery jurisdiction in decreeing specific performance is the supposed impossibility of doing justice to the parties by the award of damages for the breach. But where the parties themselves have agreed upon the compensation for the breach, or, what is the same thing in principle, have provided the means by which it may be ascertained, the necessity for the interference of the chancellor no longer exists, and his jurisdiction falls to the ground. Without positively affirming these principles, it is sufficient to say that the decree of the court under the circumstances of this case is correct, and must therefore be affirmed.

Decree affirmed.

CONTRACT MUST BE MUTUAL TO ENTITLE PARTY TO DECREE OF SPECIFIC PERFORMANCE: *Benedict v. Lynch*, 7 Am. Dec. 484; *Watts v. Kinney*, 23 Id. 266; *Moore's Adm'rs v. Fitz Randolph*, 29 Id. 208; see, however, *Rogers v. Saunders*, 33 Id. 635; and see the principal case cited on this proposition in *Mason v. Kaine*, 63 Pa. St. 340. But in *Corson v. Mulvany*, 49 Id. 100, the principal case was distinguished as having no bearing on a case where it was

sought to enforce a contract by which the defendant agreed to allow the plaintiff to search for iron ore on the defendants' land for a fixed time; and if the plaintiff desired to purchase the land, he should have the right and privilege of doing so, there being in such instance no want of mutuality.

THE PRINCIPAL CASE IS ALSO CITED in *Finley v. Aiken*, 1 Grant Cas. 91, to the point that specific performance of a contract for the sale of land may be decreed under the laws of Pennsylvania at the suit of the vendor against the vendee.

BAKER'S APPEAL. MCGOWAN'S APPEAL. DAVIS' APPEAL.

[21 PENNSYLVANIA STATE, 76.]

INTEREST IN PARTNERSHIP ONLY PASSES TO PERSON COMING IN RIGHT OF PARTNER, be the transfer effected by whatever mode, and such interest can not be tangible, can not be made available or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts.

RIGHT TO CONFINE PARTNER, OR THOSE CLAIMING UNDER HIM, TO INTEREST IN SURPLUS, after payment of the partnership debts, is an equity resting, not in the creditors of the firm, but in the remaining partners alone, who may insist upon it or waive it at their pleasure, leaving the creditors to the personal responsibility of the partners who contracted the debts. The creditors have no lien on the partnership property, and must work out their preference through the medium of the partners whose interests remain undisposed of.

PARTNER'S ENGAGEMENT TO PAY PARTNERSHIP DEBTS IS BUT PERSONAL CONTRACT, and creates no lien where it is entered into by him on a sale to him of his partner's interest; and such partner need not appropriate the partnership assets to the payment of partnership liabilities.

PARTNERS ARE NOT DEPRIVED OF RIGHT OF ASSIGNING PARTNERSHIP ASSETS for the payment, without preference, of all the debts of the firm to whom the property belonged at the time of the assignment, by the Pennsylvania act of 1843 to prevent preference in assignments.

TRANSFER OF INTEREST BY PORTION OF PARTNERS TO OTHERS DOES NOT DISCHARGE ORIGINAL PARTNERS nor impose upon the subsequent firm any new liabilities to the creditors of the first.

APPEALS from a final decree distributing the estate and effects of a partnership. The facts are sufficiently set forth in the opinion.

Lewis and Pennypacker, for Davis and Baker.

Stevens, for the administratrix of McGowan's estate.

W. Darlington, for the appellee.

By Court, LEWIS, J. These are appeals from the decree of the common pleas of Chester county, distributing the estate and

effects of James and John Yearsley, lately trading under the firm of James Yearsley & Brother.

On the first of April, 1847, the five brothers, James, John, Nathan, Thomas, and Benjamin, entered into partnership in the iron business. On the twenty-seventh of July, 1848, Thomas and Benjamin retired from the firm, disposing of their interest in the partnership estate and effects to the other three brothers, the latter agreeing to pay the debts of the firm and to exonerate and forever defend the said Thomas and Benjamin from all obligation to pay any part of the same.

On the first of April, 1849, Nathan Yearsley sold his interest in the partnership property to John Yearsley. It is stated that this sale was without the approbation of James Yearsley. James and John, however, continued the business and contracted debts until the twelfth of December, 1850, when they executed an assignment of the partnership property of the said James Yearsley and John Yearsley, trading and doing business under the firm name of James Yearsley & Brother. This assignment was expressly to pay the creditors of the partnership "composed of the said James Yearsley and John Yearsley."

There are three classes of creditors claiming distribution of the fund in the hands of the assignees: 1. The creditors of the first firm, consisting of the five brothers; 2. The creditors of the second firm, consisting of the three brothers; and lastly, the creditors of the third firm, consisting of the two brothers, who made the assignment expressly for the benefit of their own partnership creditors.

The appellants Davis and Baker are creditors of the first firm, and McGowan was originally a creditor of that firm, but now claims to be a creditor of the second firm by means of a note given by the latter upon the surrender of his claims against the first partnership. McGowan also claims to be a creditor of the second firm for a sum of money loaned; but as this claim has been allowed to participate in the distribution, without exception, its right will not be considered here, nor its position disturbed.

Where the interest of one partner in the partnership property passes to another person, it is immaterial whether that transfer be effected by a sale by the partner himself for a valuable consideration, by a sale of his interest on execution, by his death and the succession of his executor or administrator, or by assignment under the bankrupt or the insolvent laws. "In all these cases the party coming in the right of the partner comes

into nothing more than an interest in the partnership, which can not be tangible, can not be made available, or be delivered, but under an account between the partnership and the partner; and it is an item in the account that enough must be left for the partnership debts:" *Taylor v. Fields*, 4 Ves. 396; *Deal v. Bogue*, 20 Pa. St. 228 [57 Am. Dec. 702].

But it is well settled that the right to confine such partner, or those who claim title under him, to his interest in the surplus after payment of the partnership debts, is an equity which rests in the other partners alone, and not in the creditors of the firm. The latter have no lien on the property, and must work out their preference in the distribution of the partnership funds entirely through the medium of the partners whose interests remain undisposed of: Story's Eq. Jur., sec. 1253. If they consent or submit to a different disposition of the assets, the preference of the creditors is at an end, and they must rely upon the personal responsibility of the partners who contracted the debts. Where one partner sells his interest to another, in consideration of an engagement by the latter to pay the partnership debts, the rule is the same. The engagement to pay them is but a personal contract. It creates no lien on the property. It follows as a necessary consequence, that if the partner who has acquired the interests of his former associates, and in whom resides the right to appropriate the partnership assets to the payment of partnership liabilities, thinks proper to exercise his dominion, and to make a different disposition of them, he has a right to do so; and the preference of the partnership creditors, ingrafted upon and deriving its support from his equity, ceases to exist. The scion dies with the stock. These principles are announced in Story on Part., secs. 358, 359; Gow on Part., c. 5, sec. 1; Collyer on Part., b. 4, c. 2, sec. 1; and appear to be fully sustained by *Ex parte Ruffin*, 6 Ves. 126; *Taylor v. Fields*, 4 Id. 396; *Kelly's Appeal*, 16 Pa. St. 59; *Ex parte Williams*, 11 Ves. 3; *Ex parte Fell*, 10 Id. 347; *Doner v. Stauffer*, 1 Pen. & W. 198 [21 Am. Dec. 370]; *Campbell v. Mullett*, 2 Swans. 552, and other authorities.

Lord Eldon, in *Ex parte Ruffin*, *supra*, seemed to think that if the right to dispose of the assets did not exist in the partners, "no partnership could ever arrange its affairs." And Chief Justice Gibson has shown, in *Doner v. Stauffer*, *supra*, that after a sale of the interest of one partner, the equity and the interest of the remaining partner is the subject of sale on a separate execution against him, which passes the entire interest to the pur-

chaser. And that where the interest of each is sold on separate executions for their individual debts, the partnership creditors can neither follow the property in the hands of the sheriff's vendee, nor claim any portion of the proceeds of sale. There can be no stronger illustration than this of the principle that the partnership creditors have no equity of their own upon which they can enforce a preference, or control the partners in exercising dominion over their assets, so long as they remain unincumbered by liens.

If the property from which the fund in court arises had been assigned for the benefit of the creditors of the second firm, composed of the three brothers, a question might arise whether by their agreement to pay the debts of the first firm they did not convert those debts into debts of the second. But it is not necessary to discuss that question, inasmuch as the assets have been assigned for the benefit of the creditors of the last firm, composed of the two brothers. As the whole right of property existed in those two brothers at the time of the assignment, their right to appropriate it to the payment of the partnership debts of the firm to whom it belonged is clear and unquestionable. The act of 1843 does not stand in the way of such an assignment. That act was not intended to deprive partners of their legal and equitable right to appropriate partnership assets to the payment, without preference, of all the debts of the firm to whom the property belonged at the time of the assignment.

The right of property existing in James and John Yearsley at the time of assignment, their right to appropriate it to the payment of the debts of the firm of which they were the only members being established, and the fact that they have so appropriated it being also shown, the only remaining question is, Do the appellants belong to that class of creditors? This is the pinch of the case. They were all originally creditors of the first firm. McGowan afterwards became a creditor of the second. But neither of them is a creditor of the third, unless he has become so without his knowledge or consent, by the sale made by Nathan Yearsley to his brother John, and by the act of John in bringing his interest thus purchased into the new partnership, composed of himself and his brother James.

It is not necessary to cite authorities to prove that it takes at least two to make a bargain. Nothing can be clearer than that these transactions between the partners created no contract with their creditors. No creditor could thereby be compelled to release his demand against five for the more uncertain security of

a claim against two. These transfers neither discharged the original partners nor imposed upon the subsequent firm any new liabilities to the creditors of the first. And they furnish no foundation whatever for an action by the creditors of the two first firms against the partnership last established. A creditor without a right of action is a legal impossibility. If John, when he purchased the interest of Nathan, had agreed with the latter to pay the debts of the old firm, this would not have made them his creditors; and if it had, they would not thereby have become the creditors of the new partnership about to be established. But we have no evidence of the terms of this sale, or of the consideration upon which John brought his interest into the new partnership with James, and afterwards united with him in applying the assets to the debts of that firm. The effect of the sale by Nathan to John was to dissolve the old firm, and to transfer Nathan's interest in the assets to John, subject to the right of James to insist on applying them in the first place to the payment of the liabilities of the old firm. This right he might insist upon or waive, at his pleasure. That he waived it, is demonstrated by his application of the assets to other purposes. To allow creditors of the two first firms to claim any portion of this fund would invert the well-established principle that the preference of partnership creditors is not founded upon any equity of their own, but must always be worked out through the agency of the partners; it would destroy, without authority of law, the necessary dominion which every man has over his own property, and give the control to those who have fairly transferred all their rights to others. To class these claimants as creditors of the last firm, without their consent, without the consent of the last firm, without any release of their claims against their original debtors, and without any contract or consideration whatever, would be to create a liability where none existed, either by the contracts of the parties or by the law of the land. To permit this would be an illegal interference with the rights of the creditors of the last firm, and a palpable violation of the terms of the assignment.

The errors assigned have not been sustained, and the decree of distribution is therefore to be affirmed.

LOWRIE, J., dissented.

The decree was affirmed; but subsequently the court was informed that a mistake existed as to the decree of the court below, and a rule was granted to show cause why the decree

should not be reformed, and a decree made according to the principles indicated in the preceding opinion.

LEWIS, J. It is suggested by U. V. Pennypacker, esq., that the decree of this court affirming the distribution ordered by the court below is not in conformity to the principles indicated in the opinion filed.

Upon inspection of the paper-book, it appears that the court below expressed the opinion "that the creditors of the old firm are delayed until the payment of the debts due to the creditors of the new firm;" "that the creditors of the new firm will come in on the fund for distribution before the joint creditors of the old firm;" and sent the cause "back to the same auditor for correction on this basis." It further appears that the auditor reported a distribution stated by him to be "among the creditors of the new firm, pursuant to the directions of the court." In this distribution the dates of the debts claimed are not stated, nor does it appear distinctly that by the term "new firm" the court below intended the last of the three firms; but as that was the "new firm," and as the principles contained in the opinion filed indicated the propriety of distributing the assets among the creditors of the firm last engaged in business, composed of the two persons who made the assignment, it was supposed that the distribution below was among those creditors, and for that reason the decree was affirmed.

In order that the alleged mistake may be corrected, if shown to exist, it is ordered that a rule be granted to show cause why the decree entered in this case shall not be reformed, and the case committed to John K. Findlay, to report a decree of distribution according to the principles indicated in the opinion of this court on file. The rule to be heard on the twenty-sixth of July, 1853, and notice to be given by Mr. Pennypacker to all the parties interested, or to their attorneys; and the record not to be remitted until this rule is disposed of.

INTEREST OF PARTNER ONLY PASSES TO PERSON COMING IN RIGHT OF PARTNER: See *Deal v. Bogue*, 57 Am. Dec. 702, and note thereto. In *Lucas v. Laws*, 27 Pa. St. 212, the principal case is cited as an authority for the proposition that where the interest of one partner in the partnership property passes to another person, it is immaterial whether that transfer be effected by a sale by the partner himself for a valuable consideration, by a sale of his interest on execution, by attachment, by his death and the succession of his personal representatives, or by assignment under the bankrupt or insolvent laws. "In all these cases, the party coming in the right of the partner comes into nothing more than an interest in the partnership, which

can not be tangible, can not be made available, or be delivered, but under an account between the partnership and partner; and it is an item in the account that enough must be left for the partnership debts." And in *Whigham's Appeal*, 63 Id. 199, the latter part of this proposition is said to be quoted with approval in the principal case from *Taylor v. Fields*, 4 Ves. 396.

PARTNERSHIP CREDITORS HAVE NO LIEN ON FIRM PROPERTY for the payment of their debts; their preference must be worked out through the medium of the partners: *Ketchum v. Durkee*, 45 Am. Dec. 412, and note; *Ladd v. Griswold*, 46 Id. 443; *Allen v. Center Valley Co.*, 54 Id. 333, and note; *Wilson v. Soper*, 56 Id. 573; and see *Howe v. Lawrence*, 57 Id. 68; but see *White v. Dougherty*, 17 Id. 802; *Bardwell v. Perry*, 47 Id. 687. The principal case is cited to this proposition, particularly the latter portion, in *Walker v. Eyth*, 25 Pa. St. 217; *Siegel v. Chidsey*, 28 Id. 286; *Coover's Appeal*, 29 Id. 14; *Cope's Appeal*, 39 Id. 288; *Backus v. Murphy*, Id. 401.

EQUITY OF PARTNER TO INSIST UPON APPLICATION OF PARTNERSHIP PROPERTY TO PARTNERSHIP CLAIMS IS WAIVED OR GONE upon a sale or transfer of his interest in the partnership, either voluntarily or upon execution: *Siegel v. Chidsey*, 28 Pa. St. 286; *Coover's Appeal*, 29 Id. 14; *Taggart v. Keys*, 3 Phila. 97; *Rex v. Lomman*, Id. 287, all citing the principal case. See further on the waiver or extinguishment of partners' liens, *Ketchum v. Durkee*, 45 Am. Dec. 412; *Ladd v. Griswold*, 46 Id. 443; *Bardwell v. Perry*, 47 Id. 687; *Wilson v. Soper*, 56 Id. 573. And when once waived or parted with, the partnership creditors can claim no preference: *Taggart v. Keys*, *Rex v. Lomman*, *supra*; but in *Menagh v. Whitwell*, 52 N. Y. 171, 172, the principal case was distinguished in holding that where two of five members of a partnership withdrew and transferred their interests to one of the others, who continued the business, although the old firm was dissolved, the rights of the creditors in respect to past transactions were not affected thereby, but all the partnership property continued liable for partnership debts.

CREDITORS' RIGHTS AGAINST INCOMING PARTNER AGREEING TO PAY DEBTS OF OLD FIRM.—The creditors can not sue for a breach of such an agreement: *Lec's Adm'rs v. Fontaine*, 44 Am. Dec. 505; and the partner may make a different disposition of the assets, and leave the creditors to the personal responsibility of the outgoing partner: *Siegel v. Chidsey*, 28 Pa. St. 286, citing the principal case.

THE PRINCIPAL CASE WAS FURTHER CITED in *Vandike's Appeal*, 57 Pa. St. 12, to the point that when partnership property is sold under separate executions against the partners individually, the proceeds represent the several interests of the partners, and not that of the partnership, and must be appropriated accordingly; and distinguished in *Estate of Miller*, 6 Phila. 324, in holding that where a debtor assigned his estate to trustees to pay in full a certain number of creditors, it was an assignment with preference under the act of 1843, in that the principal case only declared that the assignment there passed upon made the very distribution of the property which the law would have otherwise done.

SHARPLESS v. MAYOR ETC. OF PHILADELPHIA.

[21 PENNSYLVANIA STATE, 147.]

CONSTITUTION ITSELF MUST BE LOOKED TO IN DETERMINING VALIDITY OF LEGISLATIVE ACT. The general principles of justice, liberty, and right not contained or expressed in that instrument are not proper elements of a judicial decision upon it.

ACT OF LEGISLATURE IS VALID if it be within the general grant of legislative power, that is, if it be in its character and essence a law, and if it be not forbidden, expressly or impliedly, either by the state or federal constitution.

TO MAKE ACT OF LEGISLATURE VOID, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt.

LEGISLATIVE ACT AUTHORIZING SUBSCRIPTION BY CITY TO STOCK OF RAILROAD CORPORATION IS NOT FORBIDDEN by section 13 of article 1 of the Pennsylvania constitution, providing that each house may determine the rules of its proceedings, punish and expel members, and "shall have all other powers necessary for a branch of the legislature of a free state," that section not being a restriction upon the legislative authority of the two houses, but a bestowal of privileges upon the separate branches.

OBLIGATIONS OF ANY EXISTING CONTRACT ARE NOT IMPAIRED by an act of the legislature authorizing a city to subscribe to railroad stock, nor does the act attempt the impossibility of creating a contract, but merely authorizes two corporations to make one if they shall see proper.

LANDS, GOODS, OR PERSONS ARE NOT INJURED BY LEGISLATIVE ACT authorizing a subscription by a city to railroad stock, so that residents and taxpayers of the city are entitled to a judicial remedy for it agreeably to section 11 of article 9 of the Pennsylvania constitution, providing that the courts shall be open, and "every man for an injury done him in his lands, goods, person, or reputation, shall have redress by due course of law, and right and justice administered without sale, denial, or delay." It is no injury at all except on the gratuitous assumption that it is forbidden in some other part of the constitution.

RIGHT OF ACQUIRING, POSSESSING, AND PROTECTING PROPERTY IS NOT VIOLATED, under section 1 of article 9 of the Pennsylvania constitution, by a legislative act authorizing a city to subscribe to railroad stock. The right of property is not so absolute but that it may be taxed for the public benefit.

LEGISLATIVE ACT IS NOT TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, contrary to section 10 of article 9 of the Pennsylvania constitution, when it authorizes a city to subscribe to railroad stock. When property is not seized and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than it was before, it is not taken.

PERSON WILL NOT BE DEPRIVED OF PROPERTY without the "judgment of his peers or the law of the land," in violation of section 9 of article 9 of the Pennsylvania constitution, by an act of the legislature authorizing a city to subscribe to railroad stock. It can not be said that a citizen is

deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it.

LEGISLATIVE ACT AUTHORIZING TAKING OF PRIVATE PROPERTY FOR PRIVATE USE WOULD BE UNCONSTITUTIONAL, because it would not be legislation but a mere decree between private parties. But an act authorizing a city to subscribe to railroad stock is no taking in any sense, for any purpose, or for any uses.

CITIZENS AND TAX-PAYERS HAVE NO GROUND OF COMPLAINT AGAINST LEGISLATIVE ACTS authorizing a city to subscribe to railroad stock, except because such acts authorize the creation of a public debt, of which they may be required hereafter to pay a part in the shape of taxes. By taxation alone can harm ever come to them.

LAWS AUTHORIZING CITY TO SUBSCRIBE TO RAILROAD STOCK ARE UNOBJECTIONABLE if it be within the scope of legislative power, with the consent of the local authorities, to permit the assessment of a local tax for the purpose of assisting the corporation to build a railroad.

TAXATION IS LEGISLATIVE RIGHT AND DUTY, which must be exercised by the legislature, or under the authority of laws passed by them.

POWER OF LEGISLATURE WITH REFERENCE TO TAXATION IS LIMITED only by their own discretion. For the abuse of it, members are accountable to nobody but their constituents.

TAXATION MEANS CERTAIN MODE OF RAISING REVENUE FOR PUBLIC PURPOSE in which the community that pays it has an interest. The right of the state to lay taxes has no greater extent than this.

ACT OF LEGISLATURE WOULD NOT BE LAW when it authorizes contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest. The act would be but a sentence commanding the periodical payment of a certain sum by one portion or class of people. The power to make such order is not legislative but judicial, and was not given to the legislature by the general grant of legislative authority.

TAX LAW IS NOT UNCONSTITUTIONAL ON GROUND that the act authorizes contributions to be levied for a public purpose in which those from whom they are exacted have no interest, unless it is apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. And this is more especially true if it be a local tax, and if the authorities have themselves laid the tax in pursuance of an act of the legislature.

RAILROADS ARE NOT PRIVATE AFFAIRS BUT PUBLIC IMPROVEMENTS, and it is the right and duty of the state to advance the commerce and promote the welfare of the people by making or causing them to be made at the public expense.

STATE MAY PERMIT DESIRABLE PUBLIC IMPROVEMENT TO BE DONE BY COMPANY if she declines to make it herself, and the fact that it is made by a private corporation does not take away its character as a public work.

INTEREST OF PUBLIC IS NOT EXTINGUISHED, NOR IS WORK MADE PRIVATE ONE, though the corporation has an interest in it, because a company making a public improvement has the right to be compensated for the expense of constructing it by taking tolls for its use.

STATE MAY RIGHTFULLY AID IN EXECUTION OF PUBLIC WORKS by delegating to a corporation the right of eminent domain, or by an exertion of the taxing power.

RIGHT OF LEGISLATURE TO TAX PARTICULAR CITY FOR LOCAL IMPROVEMENT, with the consent of the local authorities, is as clear as the right to lay a general tax for any purpose whatever.

STATE MAY AUTHORIZE CITY OR DISTRICT TO CREATE DEBT by a subscription to the stock of a private corporation engaged in making a public work, provided such city or district has a special interest in the work to be so aided; the state having the constitutional power to create a state debt by such a subscription on behalf of the whole people.

COURT WILL NOT DETERMINE AMOUNT OF CITY'S INTEREST IN PROPOSED RAILROAD, to the stock of which such city has been authorized to subscribe. Such matters are to be settled by her own officers and by the legislature; and it is enough for the court to know that the city may have a public interest in the railroad, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at first blush.

BILL in equity for an injunction, filed in the supreme court by Sharpless and three others, for themselves, and for such other citizens, residents, and tax-payers of the city of Philadelphia who might agree to contribute to the expenses of the suit, against the mayor, aldermen, and citizens of the said city. The opinion states the facts.

B. H. Brewster and Mallery, for the complainants.

Olmsted, Dallas, Brock, Read, and Campbell, for the respondents.

By Court, BLACK, C. J. On the sixth of May, 1852, an act was passed by the legislature authorizing the corporate authorities of Philadelphia city to subscribe for shares in the stock of the Philadelphia, Eastern and Water-Gap Railroad Company, and to raise the money necessary to pay for such stock by a loan on the credit of the city. On the ninth of April, 1853, a similar act was passed for a similar subscription to the stock of the Hempfield Railroad Company. In pursuance of these acts, the select and common councils required the mayor, as the executive magistrate of the city, to subscribe for ten thousand shares in the Hempfield company forthwith, and for the same number in the Water-Gap company, upon certain conditions. The mayor has made one subscription accordingly, and intends to make the other as soon as the condition of the ordinance is complied with.

The plaintiffs are residents of the city, owners of property therein, and tax-payers. They complain that these subscriptions will add another million of dollars to the already heavy debt of

the city, impair the public credit thereof, and greatly augment the taxes of the people. The object of the bill is to restrain the mayor from carrying the ordinances into effect. The whole subject has been argued on the motion for a special injunction. Our decision now will terminate the controversy, and have all the effect of a final decree.

None of the facts are disputed. No question of construction is raised on the act of assembly, or on the ordinances. It is not pretended that anything has been done or is likely to be done by the authorities of the city except what the legislature meant to authorize. But the plaintiffs assert that the laws are unconstitutional and void. Whether the legislature can pass a valid act giving to a municipal corporation the power of subscribing to the stock of a railroad company is the sole question before us.

This is, beyond all comparison, the most important cause that has ever been in this court since the formation of the government. The fate of many most important public improvements hangs on our decision. If all municipal subscriptions are void, railroads, which are necessary to give the state those advantages to which everything else entitles her, must stand unfinished for years to come, and large sums already expended on them must be lost. Not less than fourteen millions of these stocks have been taken by boroughs, counties, and cities within this commonwealth. They have uniformly been paid for, either with bonds handed over directly to the railroad companies, or else with the proceeds of similar bonds sold to individuals who have advanced the money. It may well be supposed that a large amount of them are in the hands of innocent holders, who have paid for them in good faith. We can not award the injunction asked for without declaring that all such bonds are as destitute of legal validity as so much blank parchment. Besides the deadly blow it would give to our improvements, and the disastrous effect of it on the private fortunes of many honest men at home and abroad, it would seriously wound the credit and character of the state, and do much to lessen the influence of our institutions on the public mind of the world.

The reverse of this picture is not less appalling: it is even more so, as some view it. If the power exists, it will continue to be exerted, and generally it will be used under the influence of those who are personally interested, and who do not see or care for the ultimate injury it may bring upon the people at large. Men feel acutely what affects themselves as individuals,

and are but slightly influenced by public considerations. What each person wins by his enterprise is all his own; the public losses are shared by thousands. The selfish passion is intensified by the prospect of immediate gain; private speculation becomes ardent, energetic, and daring; while public spirit—cold and timid at the best—grows feebler still when the danger is remote. Under these circumstances, it is easy to see where this ultraenterprising spirit will end. It carried the state to the verge of financial ruin; it has produced revulsions of trade and currency in every commercial country; it is tending now, and here, to the bankruptcy of cities and counties. In England no investments have been more disastrous than railway stocks, unless those of the South Sea bubble be an exception. In this country they have not generally been profitable. The dividends of the largest works in the neighboring states, north and south of us, have disappointed the stockholders. Not one of the completed railroads in this state has uniformly paid interest on its cost. If only a few of the roads projected in Pennsylvania should be as unfortunate as all the finished ones, such a burden would be imposed on certain parts of the state as the industry of no people has ever endured without being crushed. Still, this plan of improving the country, if unchecked by this court, will probably go on until it results in some startling calamity, to rouse the masses of the people.

But all these considerations are entitled to no influence here. We are to deal with this strictly as a judicial question. However clear our convictions may be that the system is pernicious and dangerous, we can not put it down by usurping authority which does not belong to us. That would be to commit a greater wrong than any which we could possibly repair by it. So on the other hand, the loss to the bondholders, the ruin of the railroad companies, the injury to the commerce, and even the stain on the character of the state, are considerations which can not be weighed for a moment in any scale of ours against the constitutional rights of the parties before us. We will therefore address ourselves to the serious business of ascertaining whether the laws in question do violate the constitution or not.

It is important, first of all, to settle the rule of interpretation. This can be best done by a slight reference to the origin of our political system. In the beginning, the people held in their own hands all the power of an absolute government. The transcendent powers of parliament devolved on them by the revolu-

tion: *Bonaparte v. Camden etc. R. R. Co.*, 1 Baldw. 220; *Johnson v. McIntosh*, 8 Wheat. 584; *Wilkinson v. Leland*, 2 Pet. 656. Antecedent to the adoption of the federal constitution, the power of the states was supreme and unlimited: *Farmers' and Mechanics' Bank v. Smith*, 3 Serg. & R. 68. If the people of Pennsylvania had given all the authority which they themselves possessed to a single person, they would have created a despotism as absolute in its control over life, liberty, and property as that of the Russian autocrat. But they delegated a portion of it to the United States, specifying what they gave, and withholding the rest. The powers not given to the government of the union were bestowed on the government of the state, with certain limitations and exceptions expressly set down in the state constitution. The federal constitution confers powers particularly enumerated; that of the state contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself. The federal government can do nothing but what is authorized expressly or by clear implication; the state may do whatever is not prohibited.

The powers bestowed on the state government were distributed by the constitution to the three great departments—the legislative, the executive, and the judicial. The power to make laws was granted in section 1 of article 1, by the following words: “The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives.” It is plain that the force of these general words, if there had been nothing elsewhere to qualify them, would have given to the assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British parliament. But the absolute power of the people themselves had been previously limited by the federal constitution, and they could not bestow on the legislature authority which had already been given to congress. The judicial and executive powers were also lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it. The jurisdiction of the assembly was still further confined by that part of the constitution called the “declaration of rights,” which, in twenty-five sections, carefully enumerates the reserved rights of the people, and closes by declaring that “everything in this

article is excepted out of the general powers of the government and shall remain forever inviolate." The general assembly can not, therefore, pass any law to conflict with the rightful authority of congress, nor perform a judicial or executive function, nor violate the popular privileges reserved by the declaration of rights, nor change the organic structure of the government, nor exercise any other power prohibited in the constitution. If it does any of these things, the judiciary claims, and in clear cases has always exercised, the right to declare such acts void.

But beyond this there lies a vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others. Of this field the general assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their own discretion. The reservation of some powers does not imply a restriction on the exercise of others which are not reserved. On the contrary, it is a universal rule of construction, founded in the clearest reason, that general words in any instrument or statute are strengthened by exceptions and weakened by enumeration. To me it is as plain that the general assembly may exercise all powers which are properly legislative, and which are not taken away by our own or by the federal constitution, as it is that the people have all the rights which are expressly reserved.

We are urged, however, to go further than this, and to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we can not do this. It would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up every *casus omissus*, and interpolate into it whatever in our opinion ought to have been put there by its framers. The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument, we become ourselves the aggressors, and violate both the letter and spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away; if we can amend, we can mar; if we can remove the landmarks which we find established, we can obliterate them; if we can change the constitution in any particular, there is nothing but our own will to prevent us from demolishing it entirely.

The great powers given to the legislature are liable to be abused. But this is inseparable from the nature of human

institutions. The wisdom of man has never conceived of a government with power sufficient to answer its legitimate ends, and at the same time incapable of mischief. No political system can be made so perfect that its rulers will always hold it to the true course. In the very best, a great deal must be trusted to the discretion of those who administer it. In ours, the people have given larger powers to the legislature, and relied for the faithful execution of them on the wisdom and honesty of that department, and on the direct accountability of the members to their constituents. There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary.

There is nothing more easy than to imagine a thousand tyrannical things which the legislature may do if its members forget all their duties, disregard utterly the obligations they owe to their constituents, and recklessly determine to trample upon right and justice. But to take away the power from the legislature because they may abuse it, and give to the judges the right of controlling it, would not be advancing a single step, since the judges can be imagined to be as corrupt and as wicked as legislators.

It has been said of the ablest judge that ever sat on this bench, and one whose purity of character was as perfect as any one who has ever lived or ever will live, that his opinions on such subjects are not to be relied on. If this be so, then transferring the seat of authority from the legislature to the courts would be putting our interests in the hands of a set of very fallible men, instead of the respectable body which now holds it. What is worse still, the judges are almost entirely irresponsible, and heretofore they have been altogether so, while the members of the legislature who would do the imaginary things referred to "would be scourged into retirement by their indignant masters."

I am thoroughly convinced that the words of the constitution furnish the only test to determine the validity of a statute, and that all arguments, based on general principles outside of the constitution, must be addressed to the people, and not to us.

A proposition which results as plainly as this does from the reason of the thing can scarcely need the aid of authority. But if the doctrine I am denying could be allowed to prevail, it would decide this case in favor of the plaintiffs without looking into the constitution at all; for it must be admitted that such

measures can not be sustained on principles of moral justice and propriety. This consideration, together with the great ability and earnestness with which it was pressed upon us by the counsel, entitles it to the fullest refutation we can give.

It is true that expressions favoring it have incidentally fallen from several eminent judges: from Judge Patterson: *Vanhorne v. Dorrance*, 2 Dall. 304; from Judge Chase: *Calder v. Bull*, 1 Pet. Cond. 173; from Judge Spaulding of Ohio: *Griffith v. Commissioners*, 20 Ohio, 609; and from Chief Justice Parker of Massachusetts: *Ross' Case*, 2 Pick. 165. The first is contained in a charge delivered in the circuit court. But the whole case has several times been said by this court to have been totally misapprehended: *Satterlee v. Matthewson*, 16 Serg. & R. 179; *McMasters v. Commonwealth*, 3 Watts, 295. It was not followed by those who sat in the same court afterwards. The others were mere *obiter dicta*.

On the other side the weight of authority is overwhelming. I am not aware that any state court has ever yet held a law to be invalid, except where it was clearly forbidden. Certainly no case of a different character has been cited at the bar. In the many cases which affirm the validity of state laws, this principle is uniformly recognized, either tacitly or expressly. The supreme court of the United States has adhered to it on every occasion when it has been questioned there.

In *Satterlee v. Matthewson*, 2 Pet. 380, an act of the Pennsylvania legislature was censured as unwise and unjust; but, because it came within no express prohibition of the constitution, it was held to be binding on the parties interested; and in *Fletcher v. Peck*, 6 Cranch, 87, it was declared that while the legislature was within the constitution, even corruption did not make its acts void. In *Calder v. Bull*, 3 Dall. 386, Mr. Justice Iredell said: "If a state legislature shall pass a law within the general scope of their constitutional powers, the court can not pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard, the ablest and the purest men have differed upon the subject; and all the court, in such an event, could say would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was contrary to abstract principles of right." Judge Washington, in *Golden v. Prince*, 3 Wash. 813, decides that the state legislatures may make such laws as they think fit, unless inconsistent with the powers exclusively

vested in the government of the United States, or forbidden by some article of the federal or state constitution. Judge Baldwin, in *Bennett v. Boggs*, 1 Baldw. 74, has expressed so clearly what I think is the true view of the subject, that I can not do better than transcribe his words. "We may think," says he, "the powers conferred by the constitution of this state too great or dangerous to the rights of the people, and that limitations are necessary; but we can not affix them, or act on cases arising under state laws, as if boundaries had been affixed by the constitution previously. We can not declare a legislative act void because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the people of the state, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise and oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fails, the people, in their sovereign capacity, can correct the evil; but courts can not assume their rights."

Chief Justice Marshall, in the *Providence Bank v. Billings*, 4 Pet. 562, says: "The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, when there is no express contract, against excessive taxation, as well as against unwise legislation generally." When we come home and look into the precedents established by this court, we find them uniformly and distinctly denying the right to go beyond the constitution. In *Norris v. Clymer*, 2 Pa. St. 285, Chief Justice Gibson, with characteristic directness of expression, declares that the constitution allows to the legislature every power which it does not positively prohibit. It was laid down in *Commonwealth v. McCloskey*, 2 Rawle, 374, that if the legislature pass a law within the scope of their constitutional power, the judicial tribunals have no right to pronounce it void. *Commonwealth v. McWilliams*, 11 Pa. St. 61, decided that express prohibition or necessary implication is essential to oust the jurisdiction of the legislature. In the very last case that came before us, *Commonwealth v. Hartman*, 17 Id. 118, it was decided that the assembly had jurisdiction of all cases in which its legislation was not prohibited; that the law then in question was valid, because there was no syllable in the constitution to forbid it; and that if a law, unjust in its operation and nevertheless not forbidden by the constitution, should be enacted, the remedy lay not in an appeal to the judiciary, but to the

people, who must apply the corrective themselves, since they had not intrusted the power to us.

There is another rule which must govern us in cases like this, namely, that we can declare an act of assembly void only when it violates the constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds. This principle is asserted by judges of every grade, both in the federal and in the state courts; and by some of them it is expressed with much solemnity of language: *Fletcher v. Peck*, 6 Cranch, 87; *Cooper v. Telfair*, 4 Dall. 14; *Moore v. Houston*, 3 Serg. & R. 178; *Eakin v. Raub*, 12 Id. 339; *Commonwealth v. Smith*, 4 Binn. 123. A citation of all the authorities which establish it would include nearly every case in which a question of constitutional law has arisen. I believe it has the singular advantage of not being opposed even by a *dictum*.

We are to inquire, then, whether there is anything in the constitution which expressly or by clear implication forbids the legislature to authorize subscriptions by a city to the capital stock of a company incorporated for the purpose of making a railroad. It is admitted that there is nothing in the constitution of the United States by which this power is taken away from the legislatures of the states, unless it be a single provision, which is also found in that of Pennsylvania: Art. 9, sec. 9. I shall consider every part of the constitution relied on, as prohibitory of these laws, by the counsel who have addressed us either in this cause or in the others which involve the same question.

In section 13 of article 1 it is provided "that each house may determine the rules of its proceedings; punish its members for disorderly behavior, and with the concurrence of two thirds expel a member, but not a second time for the same cause; and shall have all other powers necessary for a branch of the legislature of a free state." The argument deduced from this is, that the legislature can make no law which is inconsistent with the freedom of the state; that is, with the just rights and liberties of the people. But it is very manifestly meant not to limit the powers of the general assembly, but to confer certain parliamentary privileges on the separate branches, so that each house, when in session, could, without the concurrence of the other, promptly protect itself against indecency, disorder, corruption, or other misbehavior of members or strangers. The word "free" is to be understood of the state in her corporate capacity, and in the sense of independent or sovereign, and not of her individual, citizens. If it can be construed as a restraint of legisla-

tive power, it renders the declaration of rights useless, and reduces all the provisions for that purpose to a single phrase. Why should particular exceptions be inserted if everything was covered by this most comprehensive restriction?

It is objected that these laws create a contract for the people of the city; and as the legislature can not impair a contract, neither can they make one between parties who do not themselves assent to it. It must be remembered that the prohibition to pass any law impairing the obligation of contracts can avail nothing unless the case comes exactly within it. The supreme court of the United States, in *Satterlee v. Matthewson*, 2 Pet. 414, held that an act which was retrospective in its operation, and took away vested rights, was nevertheless not void under that section in the federal constitution, because it did not literally impair the obligation of a pre-existing contract.

I do not say, however, that a contract between two individuals or between two corporations can be made by the legislature. That would not be legislation. Besides, it would be impossible in the nature of things; for the essence of a contract is the agreement of the parties. But here is no contract made or attempted to be made by the legislature, but only an authority given to the respective corporations to make one between themselves if they see proper. This authority to make contracts for and in the name of the people is given in a greater or less degree to all public corporations. It is necessary to their existence. All other corporate functions would be nugatory without it. It is constantly exercised by the supervisors of townships, by county commissioners, and by the proper officers of boroughs, districts, and cities. Such contracts can seldom be made with the unanimous approbation of the people; but it has never been thought that a person may not be bound without his consent to perform his share of a public obligation. The contracts which affect a man as an individual must be made by himself; but those which affect him only as a member of the community in which he lives, and only in the same way that his fellow-citizens are affected, must be made by the authorities which the law has set over him and them.

The eleventh section of the declaration of rights provides "that all courts shall be open, and every man for an injury done him in his lands, goods, person, or reputation, shall have redress by due course of law, and right and justice administered without sale, denial, or delay." This was clearly intended to insure the constant and regular administration of

justice between man and man. To say that it is violated by refusing a judicial remedy for bad legislation would be straining it sadly. Certainly a contract, such as that which the defendants propose to make, however it may injure the plaintiffs, is not an injury for which they are entitled to redress if it be lawful to make it. To say that it is not lawful, and therefore injurious, is merely begging the question.

The first section of the same article enumerates among the natural rights of men that of "acquiring, possessing, and protecting property." Undoubtedly this is a right which the legislature can not take away. Our constitution makes property as sacred as life. But no man's right to his property can be so absolute as to exempt it from a fair share of the public burdens lawfully and constitutionally imposed. Of course we will not assume that the burden here apprehended is unlawful and unconstitutional merely that we may make it conflict with the section. To do so would be reasoning in a vicious circle.

It is further argued that these laws authorize the taking of private property for public use without just compensation, contrary to section ten of the declaration of rights. It is certain that the plaintiff can expect no compensation in the proper sense of that word as here used. It is also true that if the railroad stocks which the city authorities are about to purchase shall depreciate, or fail at any time to produce dividends equal to the interest on the bonds, the property of the citizens may be taxed to make up the difference. But property is not taken when it is merely subjected, on a future contingency, to the liability of being taxed higher than it is at present. The word "take" is one of the commonest and plainest in the language, and can not easily be misunderstood either by a lawyer or layman. As used in the constitution, it has universally, in this state and elsewhere, been interpreted to mean a taking altogether, a seizure, a direct appropriation, dispossession of the owner: *In re Philadelphia & Trenton R. R. Co.*, 6 Whart. 46 [36 Am. Dec. 202]; *In re City of Pittsburgh*, 2 Watts & S. 325; *Monongahela Nav. Co. v. Coon*, 6 Id. 116 [47 Am. Dec. 474]; *Mayor etc. of Pittsburgh v. Scott*, 1 Pa. St. 314; *Callender v. Marsh*, 1 Pick. 418; *Charles River Bridge v. Warren Bridge*, 7 Id. 344. We would be disregarding its popular as well as legal signification if we would declare property to be taken when it is merely depreciated in value, or incumbered, or incidentally injured. Least of all is it a taking to tax it: *People v. Mayor of Brooklyn*, 4 N. Y. 419 [55 Am. Dec. 266]. Inasmuch as the com-

pensation is made by the constitution a necessary concomitant of all taking for public use, if we say that taxation and taking are the same, we are reduced to the absurdity of deciding that no tax can be levied for the most important purpose of the state, without an immediate redistribution of it among the people who pay it.

The ninth section of article nine declares that the "citizen can not be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land." The word "deprived" in this section has received the same construction as the word "taken" in section ten, and for reasons equally clear and strong. It can not be said that a citizen is deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it.

It is said that this is a taking of private property for private use. If this be so, it is palpably unconstitutional. Perhaps there is nothing in the books which shows the tenacity with which this court has adhered to the letter of the constitution in determining the extent of legislative power more plainly than the doubt which was once entertained in *Harvey v. Thomas*, 10 Watts, 63 [36 Am. Dec. 141], whether the want of an express inhibition did not permit the assembly to take one man's property and give it to another. The constitution does prohibit it. It is not within the general grant of legislative power. It would be a gross usurpation of judicial authority, and would violate the very words of section 11, article 9. The legislature could not make such a rescript (for it would not be a law) any more than they could order an innocent man to be put to death without trial. But do the acts of assembly before us take private property for private use, or permit it to be done by the city authorities? I think I have shown that it is no taking at all.

The only substantial wrong complained of in the bill is that a public debt is about to be created for a purpose which the plaintiffs are unwilling to join in promoting; and that the debt may, and most probably will, involve the necessity of a tax, of which they must pay their share. Except for their liability to this tax they would have no standing in court. This is the head and front of the offending against them. But if it be imposed in pursuance of a law, passed by the supreme legislative authority of the state, and not in conflict with the constitution, it must be borne. This brings us to inquire what is the extent of the right to lay taxes.

The taxing power, being a legislative duty, is of course intrusted to the general assembly. And it is given to them without any restriction whatever. They are to use it according to their discretion, and if they abuse it, and if public opinion is not just or enlightened enough to correct their errors, there is no remedy. I use the language of Chief Justice Marshall in *McCulloch v. State*, 4 Wheat. 316, when I say that it may be exercised to any extent to which the government may choose to carry it, and that no limit has been assigned to it, because the exigencies of the government can not be limited.

But I do not mean to assert that every act which the legislature may choose to call a tax law is constitutional. The whole of a public burden can not be thrown on a single individual, under pretense of taxing him; nor can one county be taxed to pay the debt of another, nor one portion of the state to pay the debts of the whole state. These things are not excepted from the powers of the legislature, because they did not pass to the assembly by the general grant of legislative power. A prohibition was not necessary. An act of assembly commanding or authorizing them to be done would not be a law, but an attempt to pronounce a judicial sentence, order, or decree.

It is the theory of a republican government that taxes shall be laid equally in proportion to the nature of property; and when collected, shall be applied only to purposes in which the tax-payers shall have an equal interest. But this is impossible, even in the simplest state of society, and becomes more and more difficult in proportion as a higher civilization diversifies the characters, circumstances, and the pursuits of the people. "A just and perfect system of taxation," says Chancellor Kent, "is yet a *desideratum* in civil government:" 2 Kent's Com. 832. No county or municipal tax ever came up to the theory, and the taxes now levied by the state are a grievous violation of it. The improvements made by the commonwealth added largely to the fortunes of some, to others they did no service, and some were injured by them. Still, all are now compelled to pay for them. It is not therefore every inequality of burden or benefit—not every disproportion between the sum which a citizen pays and the interest which he, as an individual, has in the purpose to which it is applied—that can make a tax law void. I am of opinion, with the supreme court of Kentucky in *Cheaney v. Hooser*, 9 B. Mon. 345, that a tax law must be considered valid unless it be for a purpose in which the community taxed has palpably no interest, where it is apparent that a burden is imposed for

the benefit of others, and where it would be so pronounced at the first blush.

Neither has the legislature any constitutional right to create a public debt, or to lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by the general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them.

But it has been argued (and here, perhaps, is the strain of the case) that this will be taxation for a private purpose, because the money levied will be in effect handed over to a private corporation. I have conceded that a law authorizing taxation for any other than public purposes is void; and it can not be denied that a railroad company is a private corporation. But the right to tax depends on the ultimate use, purpose, and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it. A tax for a private purpose is unconstitutional, though it pass through the hands of public officers; and the people may be taxed for a public work, although it be under the direction of an individual or private corporation. The question, then, is, whether the building of a railroad is a public or a private affair. If it be public, it makes no difference that the corporation which has it in charge is private.

A railroad is a public highway for the public benefit, and the right of a corporation to exact a uniform, reasonable, stipulated toll from those who pass over it does not make its main use a private one. The public has an interest in such a road when it belongs to a corporation as clearly as they would have if it were free, or as if the tolls were payable to the state, because travel and transportation are cheapened by it to a degree far exceeding all the tolls and charges of every kind, and this advantage the public has over and above those of rapidity, comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth. In *Bonaparte v. Camden and Amboy Railroad Co.*, 1 Baldw. 223, although the

charter of the defendants had more features in it of a close monopoly for the mere private emolument of the stockholders than any other similar company in the country, yet the road was held to be a public work, and the plaintiff's land, taken to build it on, was decided to have been taken for public use.

It is a grave error to suppose that the duty of a state stops with the establishment of those institutions which are necessary to the existence of government; such as those for the administration of justice, the preservation of the peace, and the protection of the country from foreign enemies; schools, colleges, and institutions for the promotion of the arts and sciences, which are not absolutely necessary, but highly useful, are also entitled to a public patronage enforced by law. To aid, encourage, and stimulate commerce, domestic and foreign, is a duty of the sovereign, as plain and as universally recognized as any other. It is on this principle that the mint and post-office are in the hands of the government; for they are but aids to commerce. For the same reason we maintain a navy to keep open the highway of nations. It was a commercial restriction which caused the revolution, and injuries to our trade which produced the subsequent war against England, with all its expense of money and blood. Canals, bridges, roads, and other artificial means of passage and transportation from one part of the country to the other have been made by the sovereign power, and at the public expense, in every civilized state of ancient and modern times. I need not say how much of this has been done in Pennsylvania; but if the works erected by the commonwealth for the promotion of her commerce are not public improvements, then every law relating to them is void; every citizen may repudiate his share of the state debt if he pleases, and defend his property by force against a collector of state taxes.

It being the duty of the state to make such public improvements, if she happen to be unable or unwilling to perform it herself to the full extent desired, she may accept the voluntary assistance of an individual, or a number of individuals associated together and incorporated into a company. The company may be private, but the work they are to do is a public duty; and along with the public duty there is delegated a sufficient share of the sovereign power to perform it. The right of eminent domain is always given to such corporations. But the right of eminent domain can not be used for private purposes; and therefore if a railroad, canal, or turnpike, when made by a corporation, is a mere private enterprise, like the building of a

tavern, store, mill, or blacksmith-shop, there never was a constitutional charter given to an improvement company, and every taking of land or materials under any of them was a flagrant trespass.

If the making of a railroad is a public duty, which the state may either do entirely at the public expense or cause to be done entirely by a private corporation, it follows that such a work may be made partly by the state and partly by a corporation, and the people may be taxed for a share of it as rightfully as for the whole. The corporation may be aided by an exertion of the taxing power as well as with the right of eminent domain. Accordingly we find that from the earliest times the commonwealth has subscribed to the stock of such corporations, and paid over the money to them in pursuance of laws which no one ever doubted to be constitutional. Many millions of the state debt have been created in that way.

Now, if the legislature may create a debt and lay taxes on the whole people to pay for such subscriptions, may they not, with more justice and greater propriety, and with as clear a constitutional right, allow a particular portion of the people to tax themselves to promote in a similar manner a public work in which they have a special interest? I think this question can not be answered in the negative. It will surely not be pretended that all taxes are unconstitutional which are not laid by the state directly, which are not general, or which do not go into the state treasury. If this could be maintained, it would make our general road law unconstitutional from beginning to end. Counties and townships have always had the right given to them and the duty cast upon them of erecting their own public buildings and making their own roads. Local taxes for local purposes, and general taxes only for purposes which concern the whole state, are a vital principle of our political system, and there is no feature in it which has attracted more unqualified admiration from those who understand it best. Its justice is too obvious to need explanation. I can not conceive of a reason for doubting that what the state may do in aid of a work of general utility may be done by a county or a city for a similar work which is especially useful to such county or city, provided the state refuses to do it herself, and permits it to be done by the local authorities.

The city's charter was granted by the legislature. It may be enlarged. The same power which gave them the privileges which they have may give them others. It can not be so en-

larged as to enable the corporate authorities to embark the city in a private business, or to make the people pay for a thing in which they have no interest. But within these limits there is nothing to prevent an indefinite extension of their corporate powers.

But it is insisted that the right of a city or county to aid in the construction of public works, must be confined to those works which are within the locality whose people are to be taxed for them. The Water-Gap company stops its road north of Vine street, outside of the city limits, and the Hempfield road has its eastern terminus at Greensburg, three hundred and forty-six miles west of Philadelphia. I have already said that it is the interest of the city which determines the right to tax her people. That interest does not necessarily depend on the mere location of the road. Therefore the location can not be an infallible criterion. If the city can not have an interest in a road which stops in the Northern Liberties, then Dock Ward can have no interest in one which terminates in Upper Delaware Ward, and all the subdivisions of the city which it does not actually enter may be exempted on the same score. A railroad may run through a county without doing its inhabitants the least service. May such a county assist to make it, while a city which it supplies with bread and whose trade is doubled by it must not do so, merely because it ends outside of an imaginary line that limits the corporate jurisdiction? It seems very plain that a city may have exactly the same interest in a road which terminates outside of her borders as if the depot were within them, and a great deal more than if it passed quite through. If she has an interest in any part, she has probably an equal interest in every part. Railroads are generally made to connect important trading points with each other. The want of a link at one place breaks the desired connection as much as at another. Philadelphia has now a road to Greensburg. The Hempfield company proposes to carry it on to Wheeling. I do not see that the city is not as much interested in the Hempfield road as she would be in making an independent road starting at the corner of Schuylkill, Fifth, and Market streets, and running by way of Greensburg the whole distance to Wheeling.

But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers, and by the legislature. For us it is enough to know that the city may have a public interest in them; and that there is not a palpable and clear absence of all

possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency, not of law, much less of constitutional law. We would certainly be exercising a novel jurisdiction if we would listen to an appeal from the councils on a point of local policy, and we would be giving a novel judgment, too, if we would decide a statute to be unconstitutional because the corporate authorities of a city, in acting under it, mistook the true interest of their constituents.

We must take it for granted that the councils and the mayor have fairly represented the majority of their constituents. It may operate with great hardship on the minority, but in this country it is private affairs alone, and not public, that are exempt from the domination of majorities. It may be conceded that the power of piling up these enormous public burdens, either on the whole people or on a portion of them, ought not to exist in any department of a free government; and if our fathers had foreseen the fatal degeneracy of their sons, it can scarcely be doubted that some restriction on it would have been imposed. But we, the judges, can not supply the omission.

I will conclude with a recapitulation of the points and principles which I think settle the case.

1. In determining whether an act of the legislature is constitutional or not, we must look to the body of the constitution itself for reasons. The general principles of justice, liberty, and right not contained or expressed in that instrument are not proper elements of a judicial decision upon it.

2. If such act be within the general grant of legislative power, that is, if it be in its character and essence a law, and if it be not forbidden expressly or impliedly, either by the state or federal constitution, it is valid.

3. To make it void, it must be clearly not an exercise of legislative authority, or else be forbidden so plainly as to leave the case free from all doubt.

4. An act of assembly, authorizing a subscription by a city to the stock of a railroad corporation, is not forbidden by article 1, section 18, of the state constitution; that section not being a restriction upon the legislative authority of the two houses, but a bestowal of privileges upon the separate branches.

5. Such an act does not impair the obligations of any existing contract, nor does it attempt the impossibility of creating a contract, but merely authorizes two corporations to make one if they shall see proper.

6. This is not such an injury to the plaintiffs' lands, goods,

or persons that they are entitled to a judicial remedy for it, agreeably to section 11 of article 9. It is no injury at all, except on the gratuitous assumption that it is forbidden in some other part of the constitution.

7. It does not violate the right of acquiring, possessing, and protecting property, secured by section 1 of article 9. The right of property is not so absolute but that it may be taxed for the public benefit.

8. This is not a taking of private property for public use without compensation, contrary to section 10 of article 9. When property is not seized, and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than it was before, it is not taken.

9. It can not be said that the plaintiffs will be deprived of their property, in violation of section 9 of article 9. The settled meaning of the word "deprive" as there used is the same as that of the word "take" in section 10.

10. An act of assembly to authorize the taking of private property for private use would be unconstitutional, because it would not be legislation, but a mere decree between private parties. But this is no taking in any sense, for any purpose, or for any uses.

11. The plaintiffs have no ground of complaint against the acts of assembly now in question, except because they authorize the creation of a public debt, of which they may be required hereafter to pay a part in the shape of taxes. By taxation alone can any harm ever come to them.

12. If it be within the scope of legislative power, with the consent of the local authorities, to permit the assessment of a local tax for the purpose of assisting the corporation to build a railroad, bearing to the tax-payers the relation which these railroads do, then the laws complained of are unobjectionable.

13. Taxation is a legislative right and duty which must be exercised by the general assembly, or under the authority of laws passed by them.

14. The power of the assembly, with reference to taxation, is limited only by their own discretion. For the abuse of it, members are accountable to nobody but their constituents.

15. By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. The right of the state to lay taxes has no greater extent than this.

16. An act of the legislature authorizing contributions to be

levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of people to another. The power to make such order is not legislative, but judicial, and was not given to the assembly by the general grant of legislative authority.

17. But to make a tax law unconstitutional on this ground, it must be apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. And this is more especially true if it be a local tax, and if the local authorities have themselves laid the tax in pursuance of an act of assembly.

18. If therefore the making of a railroad be a mere private affair, or if the people of Philadelphia have manifestly no interest in the railroads which run to and towards the city from Easton and from Wheeling, then these laws are unconstitutional.

19. But railroads are not private affairs. They are public improvements, and it is the right and duty of the state to advance the commerce, and promote the welfare of the people, by making or causing them to be made at the public expense.

20. If the state declines to make a desirable public improvement, she may permit it to be done by a company, and the fact that it is made by a private corporation does not take away its character as a public work.

21. The right of the company by which it is made to be compensated for the expense of constructing it by taking tolls for its use, though it gives the corporation an interest in it, does not extinguish the interest of the public nor make the work a private one; because, to say nothing of other advantages, the public can pay the toll and still carry and travel on it very much cheaper than without it.

22. The state may, therefore, rightfully aid in the execution of such public works by delegating to the corporation the right of eminent domain, as she always does, or by an exertion of the taxing power, as she has done very often.

23. The right of the legislature, with the consent of the local authorities, to tax a particular city for a local improvement is as clear as the right to lay a general tax for any purpose whatsoever.

24. The state having the constitutional power to create a state debt by a subscription on behalf of the whole people to the stock of a private corporation engaged in making a public work,

it follows from what has been before said that she may authorize a city or district to do the same thing, provided such city or district has a special interest in the work to be so aided.

25. This is not a case in which we can determine as a matter of law that the city has no interest in the proposed railroad. That this is true as a matter of fact has not even been asserted in the argument.

26. The legislature and the councils have decided that the city has an interest large enough to justify the subscription; we can not gainsay this without declaring all interest to be flatly impossible, and to do that would be absurd.

27. Finally, the authorities of the city, in accordance with the charter and with certain laws supplementary thereto, are about to create a public debt for a public purpose, in which the city has an interest. It will be as valid and binding as if it had been legally contracted to accomplish any other public purpose for the benefit of the city.

If the judgment we are about to give should be wrong, it will be our fault, for we have been well assisted. Three causes, involving the same question, were heard in immediate succession, and were argued with an ability fully proportioned to the immense magnitude of the interests, public and private, which were at stake. I do not propose to shift any part of the responsibility upon our predecessors, or upon the judges in other states who have heretofore decided the question, and therefore I have examined it as if it were a case of the first impression; but it would be wrong to close without saying that the conclusion here reached is sustained by the highest tribunals in Virginia: *Goddin v. Crump*, 8 Leigh, 120; New York: *Thomas v. Leland*, 24 Wend. 65; Connecticut: *City of Bridgeport v. Housatonic R. R. Co.*, 15 Conn. 475; Tennessee: *Nichol v. Mayor of Nashville*, 9 Humph. 252; Kentucky: *Talbot v. Dent*, 9 B. Mon. 256; Illinois: *Shaw v. Dennis*, 5 Gilm. 405; and Ohio (unreported) [since reported: *Cincinnati etc. R. R. v. Commissioners*, 1 Ohio St. 77]. These cases are entitled to our highest respect. In most of them, and especially the later ones, the subject is very ably discussed, and they are a manifest triumph of reason and law over a strong conviction in the minds of the judges that the system they sustain was impolitic, dangerous, and immoral. Besides these, we have a case in our own books, *Commonwealth v. McWilliams*, 11 Pa. St. 61, which can not be distinguished from this, and which ought to have something more than respect. We owe it the deference due to a declaration

of the law, made by ourselves, on the faith of which the people in this and other states have invested millions of money.

I am of opinion that the motion for a special injunction ought to be refused.

WOODWARD and KNOX, JJ., delivered concurring opinions.

LEWIS and LOWRIE, JJ., delivered dissenting opinions.

The concurring opinion of Mr. Justice Woodward may be summed up as follows: The question to be decided was, "Had the legislature constitutional power to authorize the city of Philadelphia to subscribe for stock in these railroad companies, to borrow money to pay the subscriptions, and to levy taxes to pay the loans?" And from the question as thus stated, the court was not concerned with the policy of the legislation, nor with the doctrines of eminent domain, but with the constitutionality of laws for taxation. The acts were not charged with contravening any of the grants contained in the federal constitution; and as regards the state constitution, the primary questions which arose upon their validity were: 1. Are they in the nature of legislative power? 2. Do they trench upon any of the reservations in the bill of rights? On the first question it was held that taxation was a legislative power; and to the objection that this power could not be delegated, it was answered that while none of the powers of government could be delegated, the legislature might provide agencies through which to exercise the power of taxation. It was further held, in reply to the objection to the objects and purposes to which the power was applied, that while the enterprise was not a municipal purpose, and did not come within the circle of objects which municipal corporations were designed to accomplish, yet there was no constitutional provision which the judiciary could say was violated. On the second question, it was held that the provisions of the bill of rights securing the right of acquiring, possessing, and protecting property were subject to the power of taxation and the right of eminent domain, and could not be set up against a tax law; and further, that there was no clause in the bill of rights which restrained the legislative power of taxation.

The concurring opinion of Mr. Justice Knox was very similar to that of Woodward, J., with whom and with the chief justice he agreed.

CONSTITUTIONALITY OF STATUTES AUTHORIZING CITIES, ETC., TO SUBSCRIBE TO STOCK OF OR MAKE DONATIONS TO CORPORATIONS.—The building of numerous and extensive lines of railroads in our country within a time comparatively recent, followed by the prevailing desire to give such enterprises all the aid possible, under the expectation of a resulting individual and general benefit, has given rise to legislation conferring upon townships, counties, cities, and other municipal and public corporations, the most noted extraordinary power of authorizing them to subscribe to the stock of railroads running near, to, or through them, and to issue bonds and raise money in payment thereof by taxation, or to loan their credit or make donations to such railroads. The question of the constitutionality of these statutes has frequently come before the courts, and a long and almost unbroken line of decisions has established their validity in the absence of any express constitutional restriction.

SUBSCRIPTION OF MUNICIPAL CORPORATIONS TO STOCK OF RAILROADS IN GENERAL.—Acts of the legislature, then, authorizing counties, cities, towns,

and the like to subscribe to the stock of such railroads, to issue bonds, and to provide for payment by taxation of the individuals or property within their limits, are, in the absence of any provision in the constitution to the contrary, constitutional: 1 Dillon on Mun. Corp., sec. 153; 2 Redfield on Railw., sec. 230; 1 Rorer on Railr. 118; *Stein v. Mayor etc. of Mobile*, 24 Ala. 591; *Gibbons v. Mobile etc. R. R.*, 36 Id. 410; *Ex parte Selma & Gulf R. R.*, 45 Id. 696; *Opelika v. Daniel*, 59 Id. 211; *Pattison v. Supervisors of Yuba Co.*, 13 Cal. 175, 188; *Robinson v. Bidwell*, 22 Id. 379, 394; *Napa Valley R. R. v. Napa County*, 30 Id. 435; *Bridgeport v. Housatonic R. R.*, 15 Conn. 475; *Powers v. Inferior Court of Dougherty Co.*, 23 Ga. 65; *Cotton v. County Commissioners of Leon Co.*, 6 Fla. 610; *Prettyman v. Supervisors of Tazewell Co.*, 19 Ill. 406; *Robertson v. Rockford*, 21 Id. 451; *Johnson v. County of Stark*, 24 Id. 75; *Perkins v. Lewis*, 24 Id. 208; *Butler v. Dunham*, 27 Id. 474; *Keithsburg v. Frick*, 34 Id. 405; *Aurora v. West*, 9 Ind. 74; 22 Id. 88; *Petty v. Meyers*, 49 Id. 1; *Commissioners of Leavenworth Co. v. Miller*, 7 Kan. 479; S. C., 12 Am. Rep. 425; *Talbot v. Dent*, 9 B. Mon. 526; *Slack v. Maysville etc. R. R.*, 13 Id. 1; *Maddox v. Graham*, 3 Metc. (Ky.) 56, 96; *Allison v. Louisville etc. R'y*, 10 Bush, 1; *Police Jury v. Succession of McDonogh*, 8 La. Ann. 341; *Strickland v. Mississippi Cent. R. R.*, cited 27 Miss. 224; *St. Louis v. Alexander*, 23 Mo. 483; *St. Joseph etc. R. R. v. Buchanan County Court*, 39 Id. 485; *Grant v. Courter*, 24 Barb. 232, 238, 240; *Clarke v. Rochester*, Id. 446; S. C., affirmed, 28 N. Y. 605; *Bank of Rome v. Rome*, 18 Id. 38; *Starin v. Genoa*, 23 Id. 439; *Gould v. Sterling*, 24 Id. 456; *People v. Mitchell*, 35 Id. 551; *Caldwell v. Justices of County of Burke*, 4 Jones Eq. 323; *Hill v. Comm'rs of Forsythe Co.*, 67 N. C. 367; *Cincinnati etc. R. R. v. Comm'rs of Clinton Co.*, 1 Ohio St. 77; *Cass v. Dillon*, 2 Id. 607; *State v. Trustees of Union Township*, 8 Id. 394; *Moers v. Reading*, 21 Pa. St. 188, 200; *Commonwealth v. Comm'rs of Allegheny Co.*, 32 Id. 218, 232, 233; 37 Id. 277, 283; 43 Id. 400; *State v. Mayor etc. of Charleston*, 10 Rich. L. 491, 496; *Nichol v. Mayor etc. of Nashville*, 9 Humph. 252; *Lauderdale Co. v. Fargason*, 7 Lea, 153; *San Antonio v. Jones*, 28 Tex. 19, 30; *San Antonio v. Lane*, 32 Id. 405; *San Antonio v. Gould*, 34 Id. 49; *Amey v. Mayor etc. of Allegheny*, 24 How. 364; *Gilman v. Sheboygan*, 2 Black, 510; *Gelpcke v. Dubuque*, 1 Wall. 175; *Meyer v. Muscatine*, Id. 384; *Thomson v. Lee County*, 3 Id. 327; *Rogers v. Burlington*, Id. 654; *Goddin v. Crump*, 8 Leigh, 120. The principal case has always been regarded as a leading one on this proposition, and in many of the above cases it is cited as an authority. The theory sustaining the legislation is in general that the creation of a debt to be met by taxation—a subject under the control of the legislature—is authorized; that railroads are public purposes; and that all public purposes may be legitimately aided by the power of taxation.

DONATIONS OR LOANS OF CREDIT BY MUNICIPAL CORPORATIONS TO RAILROADS, IN GENERAL.—Statutes authorizing municipal corporations to loan their credit to railroads, or to donate their bonds or money, are likewise sustained: *Stockton etc. R. R. v. Common Council of Stockton*, 41 Cal. 147, 161, 172; *Douglas v. Chatham*, 41 Conn. 211; *Chicago etc. R. R. v. Smith*, 62 Ill. 268, 274; S. C., 14 Am. Rep. 99, 103; *Lafayette etc. R. R. v. Geiger*, 34 Ind. 185; *John v. Cincinnati etc. R. R.*, 35 Id. 539; *Petty v. Meyers*, 49 Id. 1; *Brokaw v. Commissioners of Gibson Co.*, 73 Id. 543; *Augusta Bank v. Augusta*, 49 Me. 507; *Davidson v. County Comm'rs of Ramsey Co.*, 18 Minn. 482, 484, 487, 492; *New Orleans etc. R. R. v. McDonald*, 53 Miss. 240; *Hallenbeck v. Hahn*, 2 Neb. 377; *Gibson v. Mason*, 5 Nev. 283; *Benson v. Mayor etc. of Albany*, 24 Barb. 248; *Walker v. Cincinnati*, 21 Ohio St. 14; S. C., 8 Am.

Rep. 24; *Railroad Co. v. County of Otse*, 16 Wall. 667; S. C., 2 Neb. 496; *Olcott v. Supervisors*, Id. 678. The principal case has also been cited on this proposition in many of the foregoing. No distinction here seems to be made between the case of subscriptions to stock where the municipality acquires a direct interest by becoming a stockholder and the case of loaning of credit and donations where there is only an indirect benefit to the inhabitants, and in both cases the conclusion is sustained by the same reasoning.

IOWA, WISCONSIN, AND MICHIGAN DECISIONS CONSIDERED.—The decisions of certain states need a special attention in this connection. In the early cases of *Dubuque Co. v. Dubuque etc. R. R.*, 4 G. Greene, 1, and *Clapp v. County of Cedar*, 5 Iowa, 15, the constitutionality of legislative authorization of subscription by counties to railroad stock is upheld; but denied by the subsequent cases of *Stokes v. County of Scott*, 10 Id. 166; *State v. County of Wapello*, 13 Id. 388; *McClure v. Owen*, 26 Id. 243. In *State v. County of Wapello* great stress was put upon the saving clause of the bill of rights, viz: "This enumeration of rights shall not be construed to impair or deny others retained by the people," as a limitation upon the legislative power; Lowe, J., saying (p. 413) that it was questionable whether Judge Black, in the principal case, would have adopted the line of argument in regard to the limit of legislative power if the constitution of Pennsylvania had contained a similar clause. Mr. Justice Dillon afterwards, in *Hanson v. Vernon*, 27 Id. 28, held, in a most elaborate opinion, in which he criticised the principal case, that the legislature had not, by virtue of the taxing power, the constitutional right to authorize money to be raised and donated to a private corporation, and that railroads were such corporations. Finally, in *Stewart v. Supervisors of Polk Co.*, 30 Id. 9—followed in *Renwick v. Davenport etc. R'y*, 47 Id. 511—the latter decisions denying the constitutionality of the legislation are virtually yet not acknowledgedly overruled. A similar conflict is found in the Wisconsin cases. At first the authority of the legislature to empower a municipal corporation to subscribe to the stock of a railroad was maintained: *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, Id. 195. Subsequently, acts authorizing a town to raise by taxation a sum of money to be donated to a private educational corporation were held invalid, on the ground that such a corporation was not a legitimate object for support by the taxing power: *Curtis' Adm'r v. Whipple*, 24 Id. 350; and of the correctness of this decision there would seem to be no doubt; but in *Whiting v. Sheboygan etc. R. R.*, 25 Id. 167, Mr. Chief Justice Dixon applies it to the case of a railroad, which he denied to be anything but an essentially private corporation, although the power of eminent domain was exercised in its behalf by the state. The learned chief justice also made a distinction between donations and subscriptions, which is approved in *Phillips v. Albany*, 28 Id. 340, but in which an act authorizing a subscription to stock was held valid on the ground of *stare decisis*. In *Rogan v. Watertown*, 30 Id. 259, where an act authorized a city to loan its credit by issuing bonds and delivering them to a railroad, it was held that the principle established by *Whiting v. Sheboygan, etc. R. R.*, *supra*, would necessarily lead to the conclusion that the bonds were void were it not for section 3, article 11, of the Wisconsin constitution, which declared that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts by such corporation;" such provision recognizing the power of cities, etc., under some circumstance and

for some purposes, to loan their credit; and it was further held that an amendatory act authorizing the mayor and city council to execute and deliver to the railroad the whole or any portion of the bonds "upon such terms as may be agreed on by the parties," could not be construed as a donation, but merely as giving the mayor and council unlimited discretion in fixing the terms upon which the bonds should be delivered as a loan of credit. Still later Wisconsin decisions hold that the power of the legislature to authorize subscriptions by counties, towns, etc., to the stock of railroads is no longer open to question: *Lawson v. Milwaukee etc. R'y*, 30 Id. 597; *Oleson v. Green Bay etc. R'y*, 36 Id. 383. In *People v. Salem*, 20 Mich. 452, Mr. Justice Cooley likewise held that an act authorizing a township board to issue its bonds to a railroad company, and to raise money by taxation to pay for them, was unconstitutional, a railroad not being a public purpose, criticising the principal case (p. 493). But an opposite conclusion was reached, after an extended examination of authorities, including the principal case (p. 138), by the United States circuit court for the district of Michigan, in *Talcott v. Pine Grove*, 1 Flipp. 120, and *People v. Salem*, *supra*, in turn denounced.

Notwithstanding these opposing views of Judges Dillon, Dixon, and Cooley—three of America's ablest jurists—the vast current of authorities upholding the constitutionality of the acts in question seems to be too strong to be stemmed, and the remedy to check the evils resulting from the subscriptions, donations, and loans of credit by municipal corporations to railroads lies with the people, by restricting the power of the legislature through constitutional amendments. This they have seen fit to do in many states, and Pennsylvania herself, in 1857, after Judge Black's great decision, amended her constitution as follows: "The legislature shall not authorize any county, city, borough, township, or corporated district, by virtue of a vote of its citizens or otherwise, to become a stockholder in any company, association, or corporation, or obtain money for or loan its credit to any corporation, association, institution, or party."

SPECIAL QUESTIONS AND CONSTITUTIONAL PROVISIONS.—It remains now to consider, with reference to railroads, certain special questions growing out of this legislation, and certain provisions in state constitutions which have been held not to forbid it. It has been stated above that in upholding the constitutionality of the legislation, railroads are considered public purposes. A power "to borrow money for any public purpose" gives, therefore, authority to a municipal corporation to borrow money to aid a railroad company, making its road as a way for public travel and transportation; and as a means of borrowing money to accomplish this object, such municipal corporation may issue its bonds, to be sold by the company, to raise the money: *Rogers v. Burlington*, 3 Wall. 654. The constitutionality of acts authorizing municipal aid to railroads is carried to the extent of holding that a county may be empowered to donate bonds to a railroad outside the county, and even outside the state, if the road will give to the county a connection which is desirable with some other region: *Railroad Company v. County of Otoe*, 16 Id. 667; S. C., 2 Neb. 496; and the same view is taken with regard to a city—the road being outside the city limits: *Davidson v. County Comm'rs of Ramsey Co.*, 18 Minn. 482, approving the principal case (pp. 484, 487, 492). Where a city council, at different times, subscribed to the stock of railroad companies within and without the state, an act confirming all such subscriptions, and declaring them obligatory, is constitutional: *State v. Mayor etc. of Charleston*, 10 Rich. L. 491, citing the principal case (p. 496) as decisive. Whether a municipal corporation can be required by a mandatory statute to become a stock-

holder in a railroad is answered both ways: *People v. Batchellor*, 53 N. Y. 128; S. C., 13 Am. Rep. 480, in the negative; and *Allison v. Louisville etc. R'y*, 10 Bush, 1, in the affirmative. The power given to a city to subscribe to railroad stock, and to issue its bonds therefor, carries with it the incidental power to receive the bonds by the railroad company, and to issue its stock, without an express authority in the company's charter for that purpose: *Clark v. Janesville*, 10 Wis. 136. A legislature may bestow the power to subscribe to the stock of a railroad directly upon a municipal corporation, without requiring it to be submitted to the people: *President etc. of Keithsburg v. Frick*, 34 Ill. 405; *Thomson v. Lee County*, 3 Wall. 327; *People v. Mitchell*, 35 N. Y. 551; and on the other hand, an act requiring the proposition to be put to a popular vote, and to be passed by a majority or a still larger number, is not open to the objection that it is a delegation of legislative power: *Cincinnati etc. R. R. Co. v. Comm'rs of Clinton Co.*, 1 Ohio St. 77; *Moers v. Reading*, 21 Pa. St. 188, 202; *Hill v. Comm'rs of Forsythe Co.*, 67 N. C. 367; *Clarke v. Rochester*, 24 Barb. 446; *Bank of Rome v. Rome*, 18 N. Y. 38; *Starin v. Genoa*, 23 Id. 439; *Gould v. Sterling*, 24 Id. 456; *People v. Mitchell*, 35 Id. 551; *Cotton v. County Comm'rs of Leon Co.*, 6 Fla. 610; *Stein v. Mayor etc. of Mobile*, 24 Ala. 591; *Police Jury v. Succession of McDonogh*, 8 La. Ann. 341; *Thomson v. Lee County*, 3 Wall. 327.

From the nature of the instrument, it has seldom been maintained that the legislation in question violated any provision of the constitution of the United States; but in *Powers v. Inferior Court of Dougherty Co.*, 23 Ga. 65, it is held that an act authorizing a county to subscribe to railroad stock, and to issue its bonds therefor, does not contravene the provisions of that instrument that no state shall pass any *ex post facto* law, or law impairing the obligation of contracts, since the act was not a law relating to crime nor to existing contracts; nor did it violate the provision that private property shall not be taken for public use without just compensation, since that clause is intended to restrict the power of the United States. When we come to state constitutions, it is held that such legislation does not conflict with the provision therein contained, that the property of a person shall not be taken for public use without just compensation, since such clause has reference to the power of eminent domain, and not to taxation: *Bridgeport v. Housatonic R. R.*, 15 Conn. 475, 501; *Hallenbeck v. Hahn*, 2 Neb. 377 (donation); *Gibson v. Mason*, 5 Nev. 283 (donation); *Gilman v. Sheboygan*, 2 Black, 510; *Johnson v. County of Stark*, 24 Ill. 75; *Cincinnati etc. R. R. v. Comm'rs of Clinton Co.*, 1 Ohio St. 77; *Grant v. Courter*, 24 Barb. 232, 238, citing the principal case; nor with the provision that a citizen shall not be deprived of his property without due process of law: *Grant v. Courter*, citing the principal case; *Gibson v. Mason*, 5 Nev. 283 (donation); nor with the provision that "no freeman shall be imprisoned, or disseised of his freehold or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land;" such section not restricting the general taxing power exercised under and in conformity to the constitutional limitations on that subject: *Johnson v. County of Stark*, 24 Ill. 75; nor with the clauses of the declaration of rights which were intended to secure to the citizen the right "of acquiring, possessing, and protecting property:" *Cotton v. Comm'rs of Leon Co.*, 6 Fla. 610. And where the provisions of an act authorizing counties and cities to subscribe to the stock of railroad corporations, and issue their bonds in payment therefor, are designed for the whole state, such act has, in contemplation of section 17, article 2, of the Kansas constitution, "a uniform operation throughout the state," notwithstanding the con-

dition or circumstances of the state may be such as not to give the act any actual or practical operation in every part thereof: *Comm'rs of Leavenworth Co. v. Miller*, 7 Kan. 479; S. C., 12 Am. Rep. 425. And it is held in a case where a donation of bonds was authorized, that the act was not repugnant to section 20, article 4, of the Nevada constitution, which prohibits the legislature from passing local or special laws upon certain subjects, among which is that for the collection of taxes; the provision simply prohibits special legislation regulating those acts which assessors and collectors generally perform: *Gibson v. Mason*, 5 Nev. 283. The legislation is likewise not prohibited by a provision that the credit of the state shall not be given or loaned to any individual association or corporation, such provision restricting the power of the state alone: *Prettyman v. Supervisors of Tazewell Co.*, 19 Ill. 406; *Robertson v. Rockford*, 21 Id. 451; *Johnson v. County of Stark*, 24 Id. 75; *Cotton v. County Comm'rs of Leon Co.*, 6 Fla. 610; *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, Id. 195, 225, 226; and it is even held, although it is extremely questionable, that where the constitution prohibits counties, cities, towns, or other municipal corporations from becoming stockholders in or loaning their credit to any corporation, the legislature is not prevented from authorizing such bodies to aid railroads by loaning their credit, donations, or otherwise: *Gibson v. Mason*, 5 Nev. 283. So a clause of the constitution that the state shall not contract debts in aid of or be a party to works of internal improvement applies only to the state: *Comm'rs of Leavenworth Co. v. Miller*, 7 Kan. 479; S. C., 12 Am. Rep. 425; *Hallenbeck v. Hahn*, 2 Neb. 377; *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, 10 Id. 195, 225, 226, the latter case limiting the principal case in so far as it may hold that the state can not authorize to be done what it can not do itself. A similar ruling is made with respect to the provision of a constitution limiting a state in the amount of debts it may contract: *Pattison v. Supervisors of Yuba Co.*, 13 Cal. 175; *Hallenbeck v. Hahn*, 2 Neb. 377. Aiding the construction of railroads by subscription, donation, or otherwise is held to be a "corporate purpose," within the meaning of constitutional provisions authorizing or empowering the legislature to authorize counties, cities, and the like to impose and collect taxes for corporate purposes: *Nichol v. Mayor etc. of Nashville*, 9 Humph. 252; *Cotton v. County Comm'rs of Leon Co.*, 6 Fla. 610; *Johnson v. County of Stark*, 24 Ill. 75; *Chicago etc. R. R. v. Smith*, 62 Id. 268; S. C., 14 Am. Rep. 99; and this even though the railroad lies wholly in another state: *Quincy etc. R. R. v. Morris*, 84 Ill. 410. Section 1, article 11, of the Wisconsin constitution, providing that "corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporations can not be attained under general laws," aside from the question whether a railroad is not a municipal purpose, relates to the kinds of corporations which may be created by special act, and not to the purposes for which it is possible to invest a municipal corporation with authority: *Clark v. Janesville*, 10 Wis. 136; *Bushnell v. Beloit*, Id. 195. So far from the legislation being prohibited by a clause in the constitution that "it shall be the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit," etc., the power of municipal corporations to loan their credit is expressly recognized: *Clark v. Janesville* and *Bushnell v. Beloit*, *supra*; *Rogan v. Watertown*, 30 Id. 259; and see *Clarke v. Rochester*, 24 Barb. 446; *Bank of Rome v. Rome*, 18 N. Y. 38; and a statute authorizing certain cities and towns

to subscribe to the capital stock of a railroad, with the approval of a popular vote, but containing no restriction as to the amount of subscription, was held, in *Smith v. Fond du Lac*, 10 Biss. 418, not to conflict with this section.

STATUTES AUTHORIZING MUNICIPAL AID TO MISCELLANEOUS CORPORATIONS.—General statutes have frequently been passed authorizing counties, cities, etc., to aid not only railroads, but all works of “public improvement;” but the cases which have thus far arisen under these statutes have been instances confined to railroads, and these have been considered. The theory which sustains these general and special acts in their application to railroad corporations certainly obtains alike to statutes authorizing aid to be given to other corporations “public” in their nature. Acts giving authority to subscribe to the stock of or make donations to a turnpike company have been sustained: *Commonwealth v. McWilliams*, 11 Pa. St. 61; *Mitchell v. Burlington*, 4 Wall. 270. So an act authorizing the city of Richmond to subscribe to the stock of a joint-stock company formed for the purpose of connecting the tide-waters of the James river with the navigable waters of the Ohio is valid: *Goddin v. Crump*, 8 Leigh. 120; as is an act authorizing an incorporated town to subscribe to the stock of a corporation formed for improving the navigation of a river contiguous to such town: *Taylor v. Comm’rs of Newbern*, 2 Jones Eq. 141. But in *Low v. Mayor etc. of Marysville*, 5 Cal. 214, it is held that if an act to the effect that “if the common council desire to take stock in any public improvement, or loan the credit of the city to any improvement, or effect a loan for any purpose,” etc., they shall submit the proposition to the electors of the city, etc., was broad enough to authorize a subscription to the stock of a corporation known as the “Citizens’ Steam Navigation Company,” then the act would be unconstitutional under the section of the California constitution which provided that “corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes;” since were it otherwise, the legislature could create a corporation by special act by first incorporating the stockholders as a municipal body! distinguishing the principal case (p. 217), on the ground that the constitution of Pennsylvania contained no such provision. If an act authorize money to be donated by a town to a corporation essentially private, as an educational institution, it is invalid; *Curtis’ Adm’r v. Whipple*, 24 Wis. 350. A city can not devote its stocks, money, or credit to the aid of a steamship company, directly or indirectly, without the authority of an act of the legislature, and this the present constitution of Pennsylvania forbids to pass: *Pennsylvania R. R. v. Philadelphia*, 47 Pa. St. 189, citing the principal case (p. 193) to the point that it left no doubt that if the question had depended on the original charter of Pennsylvania, the subscription to the stock would have been invalid. And that municipal corporations have no implied authority to aid railroads, but that the power must be conferred by express grant: See 1 Dillon on Mun. Corp., sec. 161.

CONSTITUTION OF STATE IS INSTRUMENT OF RESTRAINT AND LIMITATION: *State v. Reid*, 35 Am. Dec. 44; therefore where legislative powers are not taken away or the constitution is silent, the power to legislate exists: *Weister v. Hade*, 52 Pa. St. 477; *McGunnigle v. McKee*, 77 Id. 84; *Wisconsin Central R. R. v. Taylor Co.*, 52 Wis. 86, all citing the principal case.

JUDICIARY MAY DECLARE ACT OF LEGISLATURE UNCONSTITUTIONAL: *Hoke v. Henderson*, 25 Am. Dec. 677; *Bailey v. Philadelphia etc. R. R.*, 44 Id. 593; *Flint River Steamboat Co. v. Foster*, 48 Id. 248; *Winter v. Jones*, 54 Id. 379; but to make it void, it must violate the constitution clearly and

plainly in such a manner as to leave no doubt: *Adams v. Howe*, 7 Id. 216; *Hoke v. Henderson*, 25 Id. 677; *Tate's Ex'rs v. Bell*, 26 Id. 221; *State v. Reid*, 35 Id. 44; *Lane v. Dorman*, 36 Id. 543; *City of Louisville v. Hyatt*, Id. 594; *Williamson v. Williamson*, 41 Id. 636; *Bruce v. Schuyler*, 46 Id. 447; *Flint River Steamboat Co. v. Roberts*, 48 Id. 178; *Baughner v. Nelson*, 52 Id. 694; *Lycoming v. Union*, 53 Id. 575; *Winter v. Jones*, 54 Id. 379. The principal case is cited to this point in *People v. Lynch*, 51 Cal. 25; *Lafayette etc. R. R. v. Geiger*, 34 Ind. 202; *Stewart v. Supervisors of Polk Co.*, 30 Iowa, 15; *Morrison v. Springer*, 15 Id. 348; *Twitchell v. Blodgett*, 13 Mich. 151; *Pleuler v. State*, 11 Neb. 555; *Gibson v. Mason*, 5 Nev. 298; *Clarke v. Rochester*, 24 Barb. 471; *Erie etc. R. R. v. Casey*, 26 Pa. St. 301; *Speer v. School Directors*, 50 Id. 157; *Patterson v. Barlow*, 60 Id. 79; *Hilbish v. Catherman*, 64 Id. 159. It will not be declared void on the ground of policy, expediency, or injustice: *Armington v. Town of Barnet*, 40 Am. Dec. 705; *Flint River Steamboat Co. v. Foster*, 48 Id. 248; *Mahorner v. Hooe*, Id. 706; *Moor v. Veazie*, 52 Id. 655; *Winter v. Jones*, 54 Id. 379; but see *Bank of State v. Cooper*, 24 Id. 517; *Coulter v. Robertson*, 57 Id. 168. The principal case is an authority for this proposition, in *Stewart v. Supervisors of Polk Co.*, 30 Iowa, 17; *Erie etc. R. R. v. Casey*, 26 Pa. St. 301; *Gibson v. Mason*, 5 Nev. 298.

LEGISLATURE CAN NOT DELEGATE ITS POWER: *Parker v. Commonwealth*, 47 Am. Dec. 480; *Dearing v. Bank of Charleston*, 48 Id. 300.

LEGISLATURE AND JUDICIARY CAN NOT EXERCISE POWERS BELONGING TO EACH OTHER: *Hawkins v. Governor*, 33 Am. Dec. 346; *Lane v. Dorman*, 36 Id. 543; *Greenough v. Greenough*, 51 Id. 567; *Dennett, Petitioner*, 54 Id. 602, and notes to these cases; and see *De Chastelluz v. Fairchild*, 53 Id. 570.

TAXES ARE PECUNIARY CHARGES IMPOSED BY LEGISLATURE FOR PUBLIC PURPOSES: *Davidson v. County Comm'rs of Ramsey Co.*, 18 Minn. 486; *Loan Association v. Topeka*, 20 Wall. 664. The objects for which the money is raised must therefore be public, and not private: *Brodhead v. Milwaukee*, 19 Wis. 652; *Commercial Bank v. Iola*, 2 Dill. 361; *People v. Salem*, 20 Mich. 474; *Grim v. Weissenberg School District*, 57 Pa. St. 437; *Hammett v. Philadelphia*, 65 Id. 152; *Gibson v. Mason*, 5 Nev. 307; and see the observations in *Hallenbeck v. Hahn*, 2 Neb. 407; and if for a public purpose, the people from whom the money is exacted must have an interest therein: *Grim v. Weissenberg School District*, 57 Pa. St. 437; and see *Hammett v. Philadelphia*, 65 Id. 152; and to sustain local taxation there must be a special local interest: *Brodhead v. Milwaukee*, 19 Wis. 666; see *Gibson v. Mason*, 5 Nev. 307. The principal case is cited to all the foregoing points.

POWER OF TAXATION IS UNDER LEGISLATIVE CONTROL AND DISCRETION: *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and note. See the principal case cited on this proposition in *Williams v. Cammack*, 27 Miss. 223; *State v. Garton*, 32 Ind. 4; and see *Blanding v. Burr*, 13 Cal. 355. Yet the exercise of the power may be forbidden by clear implication as well as express restriction: *In re Washington Avenue*, 69 Pa. St. 362. The exercise of the taxing power must be so grossly perverted as to lose the character of a legislative function before the judiciary will interpose on constitutional grounds: *Schenley v. Allegheny*, 25 Id. 130. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy a tax for that purpose: *Loan Association v. Topeka*, 20 Wall. 660. The principal case is an authority for the foregoing propositions.

DISTINCTION BETWEEN RIGHT OF TAXATION AND OF EMINENT DOMAIN: See *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and note.

CONSTITUTIONAL PROHIBITIONS THAT NO PERSON SHALL BE DEPRIVED OF HIS PROPERTY without due process of law, and that private property shall not be taken for public use without just compensation, do not apply to taxation: *People v. Mayor etc. of Brooklyn*, 55 Am. Dec. 266, and note.

CONSTITUTIONAL RIGHT TO COMPENSATION FOR PRIVATE PROPERTY TAKEN FOR PUBLIC USE does not attach where there is no taking of property, but only an indirect consequential depreciation of its usefulness or value: *Radcliff v. Mayor etc. of Brooklyn*, 53 Am. Dec. 357, and note.

RAILROADS ARE PUBLIC PURPOSES: See *Beekman v. Saratoga etc. R. R.*, 22 Am. Dec. 679, and note. As has been stated above, the constitutionality of acts authorizing municipal corporations to subscribe to the stock of railroads, make donations, etc., is sustained on the ground that they are public purposes. In addition to the authorities above referred to, see the principal case cited in particular, on the proposition that railroads are public highways for the public benefit, in *Sandford v. Railroad Co.*, 24 Pa. St. 380; S. C., 2 Phila. 132; *Clarke v. Rochester*, 24 Barb. 484.

THE PRINCIPAL CASE IS ALSO CITED in *Bennett's Branch Improvement Co.'s Appeal*, 65 Pa. St. 251, as discussing the doctrine of public improvements; in *Erie v. Erie Canal Co.*, 59 Id. 176, to the point that the legislature can compel municipal corporations within whose bounds public bridges are to construct and keep them in repair; in *Page v. Allen*, 58 Id. 345, and *Pittsburg's Appeal*, 79 Id. 324, to the point that the interest of a tax-payer, where money is to be raised by taxation or expended from the treasury, is sufficient to entitle him to maintain a bill in equity to test the validity of the law which proposes the taxation or expenditure; in *Wheeler v. Philadelphia*, 77 Id. 344, in considering the power of the supreme court of Pennsylvania to restrain municipal corporations from doing acts contrary to law and prejudicial to the interests of the community, to the point that in it no one thought of interposing the fatal argument of a want of power to restrain a municipal corporation; and in *Wisconsin Cent. R. R. v. Taylor Co.*, 52 Wis. 90, and *Russell v. Ralph*, 53 Id. 331, to the point that, as a rule of construction, general words in any instrument or statute are strengthened by exceptions and weakened by enumeration.

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ADMINISTRATORS.**See EXECUTORS AND ADMINISTRATORS.****ADMIRALTY JURISDICTION.****See JURISDICTION.****ADMISSIONS.****See EVIDENCE, 11.****ADVANCEMENT.****See EXECUTORS AND ADMINISTRATORS, 1; WILLS, 3-5.****ADVERSE POSSESSION.**

1. **ADVERSE POSSESSION FOR TWENTY YEARS** will enable a plaintiff to maintain ejectment against a defendant having the paper title who has trusted him. *Armstrong v. Risteau*, 115.
2. **UNDER STATUTE OF JAMES I., c. 16, UNINTERRUPTED POSSESSION OF LAND** for twenty years is like a descent at common law, and tolls the entry of the person having right. *Id.*
3. **CASE OF DOE v. READE, 8 EAST, 353**, does not sustain the proposition to which it is cited in 2 Arch. N. P. 318. *Id.*
4. **WHERE ANY OBJECT, AS FENCE, IS LOCATED ON THE PLATS**, and known to the witness, he may give evidence of any cutting on, or user or cultivation of, the land in any particular direction from the fence or other object located; so a witness sworn at the survey may give evidence of the general possession of the land, etc., without any particular location of the places. *Id.*
5. **FENCES ON THREE SIDES OF OBLONG OR SQUARE PIECE OF LAND** is not such an inclosure as would constitute adverse possession, where such inclosure is necessary. *Id.*
6. **ADVERSE POSSESSION, IN ORDER TO CONSTITUTE TITLE**, must be a hostile invasion of another's rights. If the acts of ownership relied upon were committed with the consent of the real owner, no title by possession can be founded upon them. *Id.*
7. **IN ORDER TO RAISE PRESUMPTION OF DEED FROM POSSESSION**, such possession should be adverse, exclusive, and continuous, and under claim of title. The finding of these facts should be left to the jury. *Id.*
8. **TO ACQUIRE TITLE BY POSSESSION**, all cases unite that it should be adverse, exclusive, and continuous, but differ as to the tests by which its character is to be determined. *Id.*
9. **IN CASE OF MIXED POSSESSION**, actual inclosure is necessary in order to defeat the title of the real owner by adverse possession. *Id.*
10. **PARTY BEING ENTITLED TO POSSESSION OF TRACT OF LAND** in possession of part thereof is in possession of all, and his possession can not be barred by adding together the different possessions of the defendant at long intervals, so as to make out twenty years. So where several persons without title enter upon land in succession, the last can not tack the possession of his predecessors to his own in order to make out said term. *Id.*
11. **ADMISSIONS BY DEFENDANT'S GRANTOR THAT PREMISES IN CONTROVERSY BELONGED TO PLAINTIFF**, and that plaintiff and said grantor had agreed upon a boundary as now claimed by plaintiff, may be evidence of boundary

and possession, but they can not prove title in plaintiff by possession, when he has admitted that defendant's deed covers said disputed premises. *Id.*

See EASEMENTS, 2-4.

ADVERTISEMENT.

See EXECUTIONS, 4.

AFFIDAVITS.

See PLEADING AND PRACTICE, 9.

AGENCY.

1. APPOINTMENT OF AGENT TO MAKE NOTE OR MEMORANDUM IN WRITING need not be in writing. It is sufficient if the contract be in writing and the agent authorized to act as such. *Curtis v. Blair*, 257.
2. DEED EXECUTED UNDER POWER OF ATTORNEY AFTER DEATH OF PRINCIPAL has no effect, as the power of attorney is revoked by principal's death. *Doe ex dem. Smith v. Smith*, 581.
3. NAME OF PRINCIPAL NEED NOT UNEQUIVOCALLY APPEAR FROM BILL OF EXCHANGE in order to exonerate the agent who draws it as such. It is sufficient if enough appears upon the face of the bill to put a prudent man upon inquiry before taking it. *Davis v. Henderson*, 229.
4. GENERAL SELLING AGENT HAS NO AUTHORITY to depart from the usual manner of accomplishing what he is employed to effect. *Upton v. Suffolk Co. Mills*, 163.
5. GENERAL SELLING AGENT HAS NO AUTHORITY TO WARRANT THAT FLOUR sold by him will keep sweet during voyage from Massachusetts to California. *Id.*
6. AGENT'S DECLARATIONS DO NOT BIND PRINCIPAL under any circumstances until the agency is first clearly established. *Marshall v. Haney*, 92.
7. WHEN PARTY NOT AFFECTED BY NOTICE TO HIS AGENT.—Party purchasing property through an agent is bound by notice to such agent, acquired in that transaction, of the rights of third parties, in any controversies with such parties; but where such agent does not inform his principal of such facts, the knowledge thereof by said agent will not be treated as implied notice, so as to affect the conscience of the principal in any subsequent sale of the property made by him. *Ross v. Houston*, 231.
8. NOTICE TO AGENT, given to him during the progress of the very transaction about which he is employed, is notice to the principal. *Id.*
9. NOTICE GIVEN TO AGENT EMPLOYED TO PURCHASE PROPERTY, of any defect in the title or quality of the property, is notice to the principal, in any controversy between him and the vendor in relation to such property. *Id.*
10. AGENT EMPLOYED TO SELL PROPERTY, WHO ACQUIRES NOTICE OF DEFECTS IN TITLE or quality thereof, is bound to disclose such defects to the purchaser to the same extent that the principal would have been, and this though the principal may not have known such facts himself. *Id.*
11. PRINCIPAL IS NOT LIABLE FOR AGENT'S ACTS, WHERE LATTER EXCEEDS HIS AUTHORITY and the acts are unsanctioned. *McCoy v. McKowen*, 264.
See FACTORS; MARRIED WOMEN; NEGOTIABLE INSTRUMENTS, 23.

AMBIGUITIES.

See EVIDENCE, 5-7; INSURANCE—FIRE, 10.

AMENDMENTS.

See COSTS, 2; PLEADING AND PRACTICE, 14, 15.

ANNUITY.

See EXECUTORS AND ADMINISTRATORS, 5.

APPEALS.

See CRIMINAL LAW, 7, 12; PLEADING AND PRACTICE, 27-29, 31, 32; Quo WARRANTO.

APPEARANCE.

See NOTICE, 1.

APPOINTMENT.

See AGENCY, 1; DEEDS, 5; RECEIVERS.

ARBITRATION AND AWARD.

AWARD BAD IN PART MAY ALSO BE GOOD IN PART. *Loomis v. Newhall*, 15 Pick. 159, overruled. *Rand v. Mather*, 131.

ARREST.

See MARRIAGE AND DIVORCE, 4; PLEADING AND PRACTICE, 19.

ASSAULT AND BATTERY.

1. RECORD OF INDICTMENT FOR ASSAULT AND BATTERY TO WHICH DEFENDANT PLEADED GUILTY is evidence in a civil action to recover damages for the same offense. *Corwin v. Walton*, 285.
2. EXEMPLARY DAMAGES ARE RECOVERABLE IN ACTION FOR ASSAULT AND BATTERY, notwithstanding the defendant has been convicted and fined on a public prosecution for the same offense, and the plaintiff introduces the record of the criminal proceedings in order to prove the offense. *Id.*
3. PUNISHMENT TO BE INFLICTED IN PUBLIC PROSECUTION MAY BE AFFECTED by verdict in civil action for the same offense, but damages to be recovered in the private suit are wholly uninfluenced by anything that may have transpired in the prosecution by the state. *Id.*

See CRIMINAL LAW, 8; TREMPASS, 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. PREFERRED CREDITOR WHOSE DEMAND IS USURIOUS IS NOT FRAUD ON OTHER CREDITORS, and does not avoid an assignment containing such preference. *Murray v. Judson*, 516.
2. ASSIGNMENT FOR BENEFIT OF CREDITORS WHICH AUTHORIZES ASSIGNEE TO SELL ON CREDIT is void, and can not be rendered valid by any act or instrument of the grantor done or made after the rights of an objecting creditor have attached. *Porter v. Williams*, 519.

See RECEIVERS.

ASSIGNMENT OF CONTRACTS.

See PLEADING AND PRACTICE, 2.

ASSOCIATIONS.

See CORPORATIONS, 2-5; SUBSCRIPTIONS.

ASSUMPSIT.

1. ASSUMPSIT CAN NOT BE MAINTAINED WITHOUT EVIDENCE OF EXPRESS PROMISE TO PAY, or proof of facts from which such a promise can be implied. *Waldron v. Chase*, 56.
2. IN ACTION FOR MONEY HAD AND RECEIVED, plaintiff can recover any money in the hands of defendant which *ex aquo et bono* belongs to the plaintiff. *Vrooman v. McKaig*, 85.
See DECRET, 2; SET-OFF, 1.

ATTACHMENTS.

1. TREASURER OF CORPORATION IS NOT LIABLE TO GARNISHMENT ON DEBT OF CORPORATION, as the funds of the corporation are not at his individual disposal. *Neuer v. O'Fallon*, 313.
2. DIRECTION BY CORPORATION TO ITS TREASURER TO PAY MONEY to defendant in attachment suit as a mere donation will subject neither the corporation nor its treasurer to garnishment. *Id.*
3. TRUSTEE WHO APPEARS IN TRUSTEE PROCESS MAY BE CHARGED for the entire debt and costs recovered by the creditor against the principal debtor, if he has that amount in his hands after the costs allowed him by the court have been deducted, even though that sum exceeds the amount the officer is directed to attach by the trustee writ. *Drew v. Towle*, 380.
4. TRUSTEE WHO MAKES DEFAULT IN TRUSTEE PROCESS is chargeable only for the sum named in the writ. *Id.*
5. IN TRUSTEE PROCESS, GENERALLY, TRUSTEE HAS NO CLAIM FOR INTEREST paid on the execution, or for officer's fees paid by him. He is discharged only to the amount of the costs allowed him and the amount of the judgment rendered against him. *Id.*
6. THAT TRUSTEE PROCESS SUIT IS PENDING IS NO CAUSE why a writ by the principal debtor against the trustee should be abated. *Id.*
7. PAYMENT OF DEBT BY TRUSTEE, AFTER BEING CHARGED THEREFOR in a trustee process, may be taken advantage of under the general issue, and without a plea *puis darrein continuance*. *Id.*
See PARTNERSHIP, 6, 7.

ATTORNEY AND CLIENT.

ATTORNEY HAVING CHARGE OF CLAIM MAY TRANSFER IT from the action and decision of such judges as the client has selected in the first instance and submit it to other persons. In such a case the legal presumption is that in so doing he acted by authority of his client. *Jones v. Horsey*, 81.
See BANKRUPTCY AND INSOLVENCY, 5; NOTICE, 2.

AWARDS.

See ARBITRATION AND AWARD.

BAGGAGE.See **RAILROADS**, 2.**BAILMENTS.**

1. **WAREHOUSEMAN'S IMPLIED OBLIGATION IN ORDINARY DEPOSIT** is that he will use due diligence in the care of the property stored, and redeliver it to the owner or to his order on demand, upon being paid a reasonable compensation for his services; and if the warehouseman without the owner's consent mixes the property with other property, and ships the same for sale, he will be liable to the owner for the value of the property thus deposited. *Chase v. Washburn*, 623.
2. **PROPERTY REMAINS IN BAILOR IN CASE OF REGULAR DEPOSIT**, and is held at the bailor's risk, unless it is appropriated by the bailee to his own use. *Id.*
3. **PROPERTY PASSES BY IRREGULAR DEPOSIT, OR MUTUUM**, as fully as in ordinary sale or exchange, and the risk of loss by accident attaches to the control and dominion of the property; the depositary in such case being required to return another article of the same kind and value, or having an option to return the specific article or another of the same kind and value. *Id.*
4. **TRANSACTION IS SALE AND NOT BAILMENT, AND RISK OF LOSS BY ACCIDENT IS UPON WAREHOUSEMAN**, where such warehouseman receives wheat, and with the depositor's consent or by custom mixes it with that of others, with the understanding that it is to be at the disposal of the warehouseman, and that when the depositor should present the receipts, the warehouseman would either pay the market price therefor or redeliver the wheat, or other wheat equal in amount and quality. *Id.*
5. **CASES ENUMERATED WHERE PERSON MAY BECOME LIABLE AS DEPOSITARY.** *Smith v. N. & L. R. R.*, 364.
6. **WHERE PROPERTY OF ONE PERSON IS VOLUNTARILY RECEIVED BY ANOTHER**, by delivery of the owner, for some different purpose from that of keeping it, and upon an express or implied agreement of a different kind which has been answered or performed, and the property remains in the hands of such party without further agreement, the law imposes the duty of a depositary without any actual contract for that purpose. *Id.*
7. **WHERE RIGHT TO RECEIVE COMPENSATION FOR HIS SERVICES** may be inferred from the circumstances of a deposit, the duty of the bailee becomes that of a depositary for hire, and he is bound to exercise ordinary care. A gratuitous depositary is bound to only slight care. *Id.*

See **COMMON CARRIERS; FACTORS**, 8.**BALLOTS.**See **ELECTIONS**, 2.**BANK BILLS.**See **NEGOTIABLE INSTRUMENTS**, 27.**BANKRUPTCY AND INSOLVENCY.**

1. **WHILE IT IS PRIVILEGE OF DEBTOR TO BE PERSONALLY DISCHARGED** from a debt, under the national bankrupt act of 1841, yet any security which

the creditor might have consisting of a lien on property was left in as full force as though the debtor had never been discharged from his debt for which the security was made. *Bush v. Cooper*, 270.

2. **CONTRACT IS VOID AS IN CONTRAVENTION OF INSOLVENT LAWS**, by which debtors agree to pay certain creditors a portion of their claim, in consideration that the creditors would not trouble or oppose the debtors' discharge in their insolvency proceedings, and would say a good word to other creditors to induce them not to oppose a discharge. *Dexter v. Snow*, 206.
3. **WHERE GRANTOR EXECUTED DEED FOR REAL ESTATE**, and therein covenants that he has the right to convey, that it is free from incumbrances, that he will defend the title, etc., the covenants not being regarded as an obligation to pay the debt: *held*, that the deed was not of a character to render it provable in bankruptcy, and consequently was not affected by the grantor's discharge in bankruptcy. *Bush v. Cooper*, 270.
4. **FOREIGN CREDITOR UNITING WITH DOMESTIC CREDITOR** in recommending a trustee for insolvent debtor places both creditors upon the same level, and both share alike in the assets. *Jones v. Horsey*, 81.
5. **FOREIGN CREDITORS' ATTORNEY** may unite with domestic creditors in recommending a trustee for an insolvent, and in the absence of proof to the contrary, such act will be presumed to be the act of his client. *Id.*

See **EXECUTORS AND ADMINISTRATORS**, 2, 13; **GUARANTY**, 3; **SALES**, 1.

BANKS AND BANKING.

See **USURY**, 2.

BARRATRY.

See **INSURANCE—MARINE**.

BATTERY.

See **ASSAULT AND BATTERY**.

BILLS AND NOTES.

See **NEGOTIABLE INSTRUMENTS**.

BILLS OF EXCEPTIONS.

See **EVIDENCE**, 10; **PLEADING AND PRACTICE**, 24-26.

BILLS OF EXCHANGE.

See **EXECUTORS AND ADMINISTRATORS**, 6, 8.

BILLS OF PEACE.

See **EQUITY**, 7.

BLANKS.

See **EXECUTIONS**, 7; **NEGOTIABLE INSTRUMENTS**, 1-3.

BONA FIDE PURCHASERS.

See **EXECUTIONS**, 10; **NEGOTIABLE INSTRUMENTS**, 1-3, 19, 22, 24.

BONDS.

See **EXECUTORS AND ADMINISTRATORS**, 6; **PLEADING AND PRACTICE**, 3, 6.

BOOKS OF ACCOUNT.

See EVIDENCE, 12.

BOUNDARIES.

See ADVERSE POSSESSION, 11.

BREACH OF PROMISE.

See MARRIAGE AND DIVORCE.

BUILDINGS.

See NEGLIGENCE.

BURDEN OF PROOF.

See INSURANCE—FIRE, 8; NEGOTIABLE INSTRUMENTS, 11, 27; PLEADING AND PRACTICE, 18; STATUTE OF FRAUDS, 6.

CANCELLATION.

See DEEDS, 3.

CARRIERS.

See COMMON CARRIERS.

CASE.

WHERE OBLIGATION TO DO PARTICULAR ACT EXISTS, and there is a breach of that obligation and a consequent damage, an action on the case will lie. *Bond v. Hilton*, 552.

See DECEIT; INFANCY, 4, 5.

CERTIFICATES OF DEPOSIT.

See NEGOTIABLE INSTRUMENTS, 4, 5.

CHARITABLE USES.

- 1. JURISDICTION OVER CHARITABLE TRUSTS EXISTS IN COURTS OF CHANCERY, independently of the statute of charitable uses, 43 Elizabeth. *Urney's Ex'rs v. Wooden*, 615.**
- 2. VALID CHARITABLE TRUST IS CREATED, both under the doctrines of the adjudged cases and under section 13 of the Ohio act for the relief of the poor, where a testator gives and devises the remainder of his estate "to the poor and needy, fatherless, etc.," of two designated townships, "to such poor as are not able to support themselves, to be divided as my executors may deem proper, without any partiality." *Id.***

CHATTEL MORTGAGES.

See MORTGAGES, 1.

CHATTELS.

See FIXTURES; GROWING TIMBER; STATUTE OF FRAUDS, 3.

CHECKS.

See CRIMINAL LAW, 9; PLEADING AND PRACTICE, 7.

CHILD EN VENTRE SA MERE.

See PARENT AND CHILD.

CIRCUTTY OF ACTION.

See PLEADING AND PRACTICE, 1.

CLIENT.

See ATTORNEY AND CLIENT.

COLLISIONS.

See RAILROADS, 6.

COMMITMENT.

See CONTEMPT.

COMMON CARRIERS.

1. ONE DOLLAR PAID BY FATHER FOR HIMSELF AND MINOR DAUGHTER is sufficient consideration for contract of carriage, in the performance of which the daughter is injured, though fifty cents for her fare were demanded and refused. *Peters v. Rylands*, 746.
2. COMMON CARRIER, WHOSE DUTY AS SUCH HAS TERMINATED, can not lay aside the goods which he has carried and neglect them, but he still remains liable for the care and custody of the property until he has delivered it to the owner or his agent, or has placed it in such a situation as may fairly be regarded as equivalent to a delivery. *Smith v. N. & L. R. R.*, 364.
3. IT IS NOT NECESSARY THAT EXPRESS POWER SHOULD BE GIVEN TO COMMON CARRIER OF GOODS in its charter to assume the liabilities of a depositary. This is one of the ordinary incidents of such corporations, unless specially restricted. *Id.*
4. COMMON CARRIER, WHO HAS PERFORMED HIS CONTRACT AS SUCH, and delivered or offered to deliver, or done something equivalent to a delivery of the goods intrusted to him, may refuse to enter into a new contract for keeping or storing said goods as a bailee for hire or a depositary. If he persists in his refusal to receive them as such, and does not interfere with them in any manner, he is not liable as a depositary for any damage which may happen to such goods. *Id.*
5. COMMON CARRIER MAY BECOME LIABLE AS DEPOSITARY where the owner of goods was present at the time they were landed, and was notified by the agent of such carrier that they had no room in which to store them, if such agent afterwards places the goods in a storehouse used by such carrier for storage purposes. In such a case the jury may infer that the agent has waived his refusal to take charge of them. *Id.*
6. OWNER OF GOODS DOES NOT MAKE COMMON CARRIER'S AGENT HIS OWN, after being notified to remove his goods, by leaving them in the care of such agent, even though such agent has instructions from his principal not to care for goods so situated. *Id.*
7. CARRIER'S REFUSAL TO PERFORM CONTRACT FOR TRANSPORTATION OF GOODS over a certain voyage, at a definite price, entitles the shipper to recover the difference between the contract price and the ordinary cost of sending by other carriers; and this, without his making proof that at the time

11. **RIGHT OF ACQUIRING, POSSESSING, AND PROTECTING PROPERTY IS NOT VIOLATED**, under section 1 of article 9 of the Pennsylvania constitution, by a legislative act authorizing a city to subscribe to railroad stock. The right of property is not so absolute but that it may be taxed for the public benefit. *Id.*
 12. **PERSON WILL NOT BE DEPRIVED OF PROPERTY** without the "judgment of his peers or the law of the land," in violation of section 9 of article 9 of the Pennsylvania constitution, by an act of the legislature authorizing a city to subscribe to railroad stock. It can not be said that a citizen is deprived of his property when he is left in the undisturbed possession of it, whatever taxation may be imposed on it. *Id.*
 13. **CITIZENS AND TAX-PAYERS HAVE NO GROUND OF COMPLAINT AGAINST LEGISLATIVE ACTS** authorizing a city to subscribe to railroad stock, except because such acts authorize the creation of a public debt, of which they may be required hereafter to pay a part in the shape of taxes. By taxation alone can harm ever come to them. *Id.*
 14. **LAWS AUTHORIZING CITY TO SUBSCRIBE TO RAILROAD STOCK ARE UNOBJECTIONABLE** if it be within the scope of legislative power, with the consent of the local authorities, to permit the assessment of a local tax for the purpose of assisting the corporation to build a railroad. *Id.*
 15. **STATE MAY PERMIT DESIRABLE PUBLIC IMPROVEMENT TO BE DONE BY COMPANY** if she declines to make it herself, and the fact that it is made by a private corporation does not take away its character as a public work. *Id.*
 16. **INTEREST OF PUBLIC IS NOT EXTINGUISHED, NOR IS WORK MADE PRIVATE ONE**, though the corporation has an interest in it, because a company making a public improvement has the right to be compensated for the expense of constructing it by taking tolls for its use. *Id.*
 17. **STATE MAY AUTHORIZE CITY OR DISTRICT TO CREATE DEBT** by a subscription to the stock of a private corporation engaged in making a public work, provided such city or district has a special interest in the work to be so aided; the state having the constitutional power to create a state debt by such a subscription on behalf of the whole people. *Id.*
- See **EMINENT DOMAIN**, 2, 3; **JURY AND JURORS**, 1, 4, 5; **TAXATION**; **WATER-COURSES**, 8.

CONSTRUCTION.

See **CONSTITUTIONAL LAW**, 5; **EVIDENCE**, 6; **FRANCHISES**; **INSURANCE—FIRE**, 1; **RAILROADS**, 1.

CONTEMPT.

1. **COURTS HAVE INHERENT POWER TO PUNISH CONTEMPTS** of their authority by fine and imprisonment, independent of any statutory provision. *Ex parte Adams*, 234.
2. **UPON MOTION TO DISCHARGE UPON HABEAS CORPUS PERSON COMMITTED** upon order of court, the only question which the court can consider is, Did the court which made the order of commitment have jurisdiction over the party and the subject-matter? If it did not the judgment was *coram non judice* and void, and the prisoner would be entitled to his discharge. *Id.*

3. **UPON MOTION TO DISCHARGE UPON HABEAS CORPUS**, where the commitment for contempt was made by a court of competent jurisdiction, there is no authority to discharge the party upon the ground that the court erred in its judgment of the law. *Id.*
4. **WHERE COURT COMMITS PARTY FOR CONTEMPT, ITS ADJUDICATION IS CONVICTION**, and its commitment an execution. Upon *habeas corpus*, the court hearing the same can no more inquire into the propriety of such conviction than it can upon a verdict of guilty upon a charge of misdemeanor inquire whether improper charges were given to the jury or improper evidence was admitted against the prisoner. *Id.*
5. **INSUFFICIENT RECORD OF CONVICTION.**—The law requires that before sentence of imprisonment is passed upon a party he must first be convicted of an offense. This conviction is generally by verdict of a jury, but in cases of contempts may be by judgment of the court. In either case the record should show a conviction. Hence a return to a writ of *habeas corpus*, which recites an order of court that "A. be sent to jail, and remain there," etc., is insufficient, as it contains no adjudication of the court that A. has been guilty of contempt. *Id.*

See INJUNCTIONS, 11.

CONTRACTS.

1. **WHERE A. APPLIED TO B., AGENT OF C.,** relative to the purchase of certain land, and B. wrote to A., informing him that he could have the land provided he closed the trade within two weeks of the date of writing, setting forth at the time the terms of sale and a description of the property: *held*, that the moment that the terms were accepted, the mutuality necessary to a complete contract was created. *Curtis v. Blair*, 257.
2. **TIME MAY BE MADE OF ESSENCE OF CONTRACT BY EXPRESS STIPULATION OF PARTIES**, or, without such express agreement, by the nature of the contract itself or of the circumstances under which it was made; as where the benefit to accrue from the consideration to be paid or the conveyance to be executed materially depends upon a strict performance in point of time. *Kirby v. Harrison*, 677.
3. **TIME MAY BE MADE ESSENTIAL IN CONTRACT BY PROPER ACTION** of a party who is not in default and is ready to perform, if the other party is in default without justification; as if a vendee without excuse fail to pay at the stipulated time, and the vendor is in no default, and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time or consider the contract rescinded. In like manner and with like consequences the vendee may notify the vendor if the latter is in default and the former is not. *Id.*
4. **WHERE TIME IS ESSENCE OF CONTRACT**, and one of the parties is not ready and able to perform his part of the agreement on the day fixed, the adverse party may elect to consider it at an end. *Curtis v. Blair*, 257.
5. **WHERE CONTRACT MUST BE PERFORMED WITHIN SPECIFIED TIME**, the party bound has until the last moment of the last day to discharge himself, but the offer to perform must be made at a proper place and within a reasonable time, so that the interests of the adverse party may not be affected injuriously. *Id.*
6. **IF PART OF AGREEMENT IS CONTRARY TO STATUTE**, this does not avoid or annul other parts of the agreement which are separable from the bad

part, and not founded upon it, unless the statute expressly or by necessary implication declares the whole void. *Rand v. Mather*, 131.

7. **ILLEGAL CONSIDERATION.**—Sale of liquor to be used as a beverage, and for resale at a bar, under a license “to sell wine and spirituous liquors for medical, mechanical, and chemical purposes, and for no other use or purpose,” is illegal, and raises no consideration which can be enforced. *Adams v. Hackett*, 376.
 8. **RESCISSION OF CONTRACT WILL GENERALLY BE DECREED WHERE SPECIFIED PERFORMANCE WOULD BE REFUSED**, though it is undoubtedly within the sound discretion of the chancellor to refuse the rescission and leave the parties to their legal remedy. *Kirby v. Harrison*, 677.
 9. **RESCISSION SHOULD BE DECREED AGAINST PARTY IN GROSS DEFAULT**, where the circumstances and value of the property have materially changed. *Id.*
 10. **TENDER OF PART OF AMOUNT DUE ON CONTRACT**, after four payments had become due, and two years after suit commenced for rescission, and after the property was greatly increased in value, is not sufficient ground for refusing the decree of rescission, no excuse for the delay being shown. *Id.*
 11. **NO POSITIVE ACT MANIFESTING INTENTION TO RESCIND CONTRACT** is necessary before filing a bill to obtain a decree of rescission, which is itself a sufficient manifestation of such intention; and if the vendee has a right to pay, he should have made or tendered payment within a reasonable time after the bill was filed. *Id.*
- See** AGENCY; ASSUMPSIT; BAILMENTS; BANKRUPTCY AND INSOLVENCY, 2; COMMON CARRIERS; CONFLICT OF LAWS; CONSTITUTIONAL LAW, 2, 4, 9; CORPORATIONS, 3-5; CO-TENANCY, 1; EQUITY, 4, 5; EVIDENCE, 5-7; EXECUTORS AND ADMINISTRATORS, 3; INFANCY; INSURANCE—FIRE; INSURANCE—LIFE; INSURANCE—MARINE; INTOXICATING LIQUORS; JUDGMENTS, 11; MARRIAGE AND DIVORCE; PHYSICIANS; SALES; SPECIFIED PERFORMANCE; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; SUBSCRIPTION; VENDOR AND VENDEE.

CONTRIBUTION.

See SURETYSHIP; TRESPASS, 7-9.

CONVERSION.

See TRESPASS, 6; TROVER.

CONVICTION.

See CONTEMPT; CRIMINAL LAW, 13, 14; JURY AND JURORS, 4.

CORPORATIONS.

1. **DIRECTORS OF INCORPORATED COMPANY CAN NOT SPECULATE WITH FUNDS** or credit of the company, and appropriate to themselves the profit of such speculation; nor can they, in making sales or purchases for the company, take advantage of their position as directors, either directly or indirectly, and a director who does so can not come into a court of equity for relief. *Redmond v. Dickerson*, 418.
2. **MEMBERS OF LODGE OF ODD FELLOWS ARE NOT LIABLE TO ACTION AT LAW FOR RECOVERY OF FUNERAL BENEFIT** by the next of kin of a deceased

member, under their constitution and by laws, which provide that "in case of the death of a brother, * * * there shall be paid to the nearest of kin of such brother a sum of not less than thirty dollars to defray the expense of his burial, which shall be paid over without delay." *Payne v. Snow*, 203.

3. UNINCORPORATED RELIGIOUS SOCIETIES MAY SUE ON CONTRACT made with them in their associate capacity and for the legitimate purposes of their association, even though there be no persons named or described in the contract as trustees or committeemen on behalf of the society. *Phipps v. Jones*, 708.
 4. UNINCORPORATED RELIGIOUS ASSOCIATIONS HAVE QUASI CORPORATE EXISTENCE IN LAW, especially in Pennsylvania since the act of 1731, with power to hold land and build appropriate houses, and to acquire and enforce contract rights. *Id.*
 5. PLAIN EQUITY PRINCIPLE ALLOWS COMMITTEE OF UNINCORPORATED SOCIETY to sue and be sued as representatives of the whole. *Id.*
- See ATTACHMENT, 1, 2; CONSTITUTIONAL LAW, 8-17; EMINENT DOMAIN, 2, 3; HIGHWAYS, 2-4; INJUNCTIONS; 9-11; OFFICES AND OFFICERS; RAILROADS.

COSTS.

1. PREVAILING PARTY IN CIVIL ACTION IS ENTITLED TO COSTS which follow the judgment as of course, and practically are incorporated into the judgment by the clerk, without any special order, unless upon objection or special hearing. *Lewis v. Ross*, 49.
 2. WHERE COSTS TO WHICH PARTY IS ENTITLED ARE BY MISTAKE OF CLERK OMITTED from the judgment, the record of the judgment may be corrected and amended so as to show that the legal costs were allowed. *Id.*
 3. ONE WHO IS SUMMONED AS TRUSTEE, AND DISCLOSES AT FIRST TERM, is entitled to his costs, and authorized to deduct the amount thereof from the amount in his hands. And he can not be deprived of them by any mere informality in the record, or misprision of the clerk, in omitting to recite in the judgment the allowance of such costs. *Id.*
- See ATTACHMENTS, 3, 5; EXECUTORS AND ADMINISTRATORS, 4, 7.

CO-TENANCY.

1. TENANTS IN COMMON AND PARTNERS MAY CONTRACT WITH ONE OF THEIR NUMBER concerning the use of the property so held; and its violation gives a good cause of action at law to those injured. *Bond v. Hilton*, 552.
2. ONE TENANT IN COMMON MAY MAINTAIN ACTION AT LAW AGAINST HIS CO-TENANT to recover the latter's proportion of moneys paid by the former to remove an incumbrance on their common property which they had assumed on their purchase thereof. *Dickinson v. Williams*, 142.
3. OPEN AND MUTUAL ACCOUNT CURRENT EXISTS BETWEEN CO-TENANTS when there are various items of payments and receipts respecting their common estate, and hence the statute of limitations against either must be computed from the last charge in such account. *Id.*

COUNTY COURTS.

See CONSTITUTIONAL LAW, 1.

COURTS.

See CONSTITUTIONAL LAW, 1; CONTEMPT; ELECTIONS, 1; INJUNCTIONS, 2.

COVENANTS.

IN ACTION FOR BREACH OF COVENANT IN NOT CONVEYING lands described in deed, the value of the land at the time of the breach constitutes the measure of damages. *Marshall v. Hancy*, 92.

See BANKRUPTCY AND INSOLVENCY, 3; DEEDS, 2, 4, 5; SET-OFF, 1.

COVENANTS TO STAND SEISED.

See DEEDS, 2, 5.

CREDITOR'S BILL.

See USURY, 1.

CRIMINAL LAW.

1. VENUE WAS ALWAYS REGARDED AS MATTER OF SUBSTANCE IN CRIMINAL TRIALS; and at common law, an offense commenced in one county and consummated in another could be tried in neither. *State v. Moore*, 354.
2. WHERE SAME OFFENSE IS CHARGED IN DIFFERENT FORMS in the indictment, it rests with the court whether a prosecutor shall be compelled to elect on which count he shall proceed. *State v. Jackson*, 281.
3. TRIAL OF ACCESSARY BEFORE FACT IN FELONY COMMITTED IN ANOTHER STATE can not be had in the county where the offense was consummated, but only in the state and county in which he committed the offense of procuring and advising the commission of the principal offense. *State v. Moore*, 354.
4. HAS GOVERNOR POWER TO PARDON PORTION OF SUPPOSED PUNISHMENT WHEN IT IS DISCRETIONARY, before it is fixed by judgment? *quære*. *State v. McIntire*, 566.
5. MISINFORMATION OF GOVERNOR APPEARING UPON FACE OF PARDON INVALIDATES IT; consequently, where the pardon shows that the governor supposed the defendant had been fined as well as imprisoned, and pardons the prisoner from imprisonment on condition that he pay the fine and costs, but the prisoner had not been fined but imprisoned only, the pardon is void. *Id.*
6. PARDON DOES NOT TAKE EFFECT IF UPON CONDITION PRECEDENT IMPOSSIBLE TO BE PERFORMED. *Id.*
7. PARDON IS VITIATED BY SUPPRESSION of the fact that the judgment was appealed from, it appearing from the charter of pardon that the executive regarded the judgment as subsisting; especially where the appeal was taken for delay and the punishment was discretionary. *Id.*
8. ASSAULT IS COMMITTED BY PERSON WHO AIMS GUN in an excited and threatening manner at plaintiff, standing three or four rods off, and snaps it two or three times, even though such gun was unloaded, if such fact was unknown to plaintiff. *Beach v. Hancock*, 373.
9. ACCUSED MAY BE GUILTY OF FORGERY although the check drawn by him had so little resemblance to the genuine check of the person whose name was forged that it was not likely to deceive the officers of the bank on which it was drawn. *Commonwealth v. Stephenson*, 154.

20. VERDICT OF JURY FINDING PARTY ACCUSED OF MURDER GUILTY OF MANSLAUGHTER in the third degree of necessity operates as an acquittal of every crime of a higher grade. In contemplation of law, the jury in such case return two verdicts, one acquitting the accused of the higher crime charged in the indictment, the other finding him guilty of an inferior crime. *Hurt v. State*, 225.
 21. VERDICT OF MANSLAUGHTER UPON TRIAL OF CHARGE OF MURDER is as much an acquittal of the latter charge as a verdict pronouncing the entire innocence of the accused would be. *Id.*
 22. JEOPARDY—VERDICT OF ACQUITTAL.—Verdict of manslaughter upon trial of charge of murder, being in effect an acquittal of the charge of murder, where the judgment upon the verdict of manslaughter is reversed upon a writ of error, the implied verdict of acquittal remains unaffected, as the writ of error brought to the consideration of the court only such proceedings of the court below as were prejudicial to the accused. In such a case the prisoner can not be again indicted for murder. *Id.*
 23. INDICTMENT DEFECTIVE IN SUBSTANCE.—When the court can not pronounce the proper sentence of the law upon a verdict finding the accused guilty, the indictment is defective in substance. In such a case, where the verdict is "guilty," the party is remanded for another indictment. It is different where the verdict is "not guilty." *Id.*
 24. EXTRAJUDICIAL CONFESSIONS OF PRISONER, where the *corpus delicti* is not proved by independent testimony, are insufficient to warrant a conviction of the accused in capital cases. *Stringfellow v. State*, 247.
 25. EVIDENCE OF THREATS IS INADMISSIBLE in favor of assailant, when it appears that sufficient time had elapsed for the blood to cool. *State v. Jackson*, 281.
 26. DECLARATION BY ASSAILED PARTY IN PALLIATION OF GUILT OF ACCUSED is inadmissible when the declaration was made some months subsequent to the commission of the assault. *Id.*
- See ASSAULT AND BATTERY, 3; EVIDENCE, 14; JURY AND JURORS, 1, 4, 5.

CROPPERS.

See LANDLORD AND TENANT, 1.

CROSS EXAMINATION.

See WITNESSES, 2.

CUSTOMS.

See USAGES.

DAMAGES.

See ASSAULT AND BATTERY; CASE; COMMON CARRIERS, 4; COVENANTS; GUARANTY, 4; HIGHWAYS; MARRIAGE AND DIVORCE, 1, 4; MASTER AND SERVANT, 2, 3; NEGLIGENCE; RAILROADS, 2, 4, 6; RELEASE; SALES, 12; SET-OFF; SPECIFIC PERFORMANCE, 4; TRESPASS, 2-5.

DEATH.

See AGENCY, 2; SUBSCRIPTION.

DECEIT.

1. **SCIENTER MUST BE PROVED IN ACTION ON CASE FOR DECEIT in sale of personalty.** *Mahurin v. Harding*, 401.
2. **DECLARATION THAT DEFENDANTS, TO INDUCE PLAINTIFF TO EXCHANGE HORSES, falsely and fraudulently affirmed their horse to be sound, when he in fact was unsound, as they well knew, whereby the plaintiff, giving credit to their affirmation, was induced to exchange, and thereby the defendants deceived and defrauded the plaintiff, is case for deceit, and not assumpsit on a warranty.** *Id.*

DECLARATIONS.

See AGENCY, 6; CRIMINAL LAW, 16; DECEIT, 2; EVIDENCE, 8-11, 14; WILLS, 1.

DECREEES.

See JUDGMENTS.

DEEDS.

1. **DEED UNTECHNICAL, UNGRAMMATICAL, AND TOTALLY AT VARIANCE with all the recognized rules of orthography may be valid if there be sufficient words to declare clearly and legally the party's meaning.** *Doe ex dem. Cobb v. Hines*, 559.
 2. **TO CREATE COVENANT TO STAND SEISED, no particular form of expression is necessary, and the words "I also place, etc., J. M. H. agent of the hereafter-named property, to be to use and benefit of my daughter C.," are sufficient, and the statute will pass the legal title from the grantor.** *Id.*
 3. **CANCELLATION OR DESTRUCTION OF DEED CONVEYING LAND WILL NOT RE-VEST TITLE IN ALIENOR, although done by mutual consent and with a view to that object.** *Tibeau v. Tibeau*, 329.
 4. **TERMS "GRANT, BARGAIN, AND SELL," in a deed, import covenants of general warranty of title against incumbrances and for quiet enjoyment, as effectually as though such covenants had been expressed in the deed.** *Bush v. Cooper*, 270.
 5. **ESTATE CAN NOT BE CREATED BY MEANS OF GENERAL POWER OF APPOINTMENT given in covenant "to stand seised" to uses, or in a deed of bargain and sale.** *Doe ex dem. Smith v. Smith*, 581.
- See ADVERSE POSSESSION, 7; AGENCY, 2; BANKRUPTCY AND INSOLVENCY, 3; COVENANTS; ESTOPPEL, 3; EVIDENCE, 4; NOTICE, 3; POWERS; TRUST DEEDS.

DEFAULT.

See ATTACHMENTS, 4; CONTRACTS, 3, 9, 10.

DEFINITIONS.

See INSURANCE—MARINE, 1; JUDGMENTS, 1, 4, 5; TAXATION, 3; WITNESSES, 2.

DELIVERY.

See BAILMENTS, 6; COMMON CARRIERS; EXECUTORS AND ADMINISTRATORS, 7; FACTORS, 1, 2, 4, 6, 7; GIFTS; NEGOTIABLE INSTRUMENTS, 9-12; SALES, 5, 7; STATUTE OF FRAUDS, 1-3.

DEMAND.

See GUARANTY, 4; NEGOTIABLE INSTRUMENTS, 7, 8; TROVER.

DEMURRER.

See PLEADING AND PRACTICE, 7, 32.

DEPOSIT.

See BAILMENTS; COMMON CARRIERS, 3-5.

DESCRIPTION.

See EXECUTIONS, 4.

DIRECTORS.

See CORPORATIONS, 1.

DISAFFIRMANCE.

See INFANCY.

DISCOUNT.

See FACTORS, 8.

DISMISSAL.

See PLEADING AND PRACTICE, 10.

DISSOLUTION.

See INJUNCTIONS, 12.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOMICILE.

1. CITIZEN OF ONE STATE DOES NOT FORFEIT HIS RESIDENCE OR RIGHTS AS SUCH CITIZEN by leaving his place of abode and breaking up his establishment with the avowed purpose of becoming a resident of another state, if before he reaches his intended destination he changes his mind and returns. *Ringgold v. Barley*, 106.
2. NEW DOMICILE IS NOT ACQUIRED BY MERE INTENTION TO SO ACQUIRE IT, without the fact of an actual removal, nor is it acquired by the removal without the intention. *Id.*
3. IF NEW PLACE OF RESIDENCE BECOMES FIXED PRESENT DOMICILE of a person, it is sufficient to fix a residence, although there may be a floating intention to return to his former place of abode at some future period. *Id.*
4. RESIDENT OF MARYLAND WHO REMOVED TO MISSOURI and commenced pursuing the usual vocations of life, thereby adopts said latter state as a place of fixed present domicile, and he becomes a resident thereof, although he may have a floating intention to return to Maryland at some future period. *Id.*

DOWER.

1. DOWER, UNTIL DEATH OF HUSBAND, IS MERELY AN INCHOATE INTEREST. *Moore v. Mayor etc. of N. Y.*, 473.

2. **CONDEMNATION OF LANDS TO PUBLIC USE**, under right of eminent domain, discharges any inchoate right of dower in the wife of the owner of the fee; and though no separate compensation is made to her, she can not, after her husband's death, recover dower in the lands taken. *Id.*

DRUNKARDS.

See INTOXICATING LIQUORS.

DYING DECLARATIONS.

See EVIDENCE, 14.

EASEMENTS.

1. **WAY BY NECESSITY**.—Where one conveys land to which there is no access, except over his remaining lands or over lands of a stranger, a right of way exists by necessity over such lands of the grantor. *Kimball v. Cochecho R. R.*, 387.
2. **PRESUMPTION CREATED BY LAPSE OF TIME IN FAVOR OF EASEMENT** is not weakened by the mere inattention or ignorance of the owner of the land respecting the fact that an easement in it is used by another. *Reimer v. Stuber*, 744.
3. **NO PRESUMPTION OF GRANT ARISES FROM ADVERSE ENJOYMENT OF EASEMENT** against minor or *feme covert*; but a second disability added to one which existed when the adverse enjoyment first began is always disregarded. So a coverture which took place during infancy is not taken into account after the infancy has ended. *Id.*
4. **RIGHT OF WAY OVER UNINCLOSED WOODLAND** can be acquired by user for twenty-one years. *Id.*

See WATERCOURSES, 10-15.

EJECTMENT.

See ADVERSE POSSESSION, 1.

ELECTION.

See CONTRACTS, 4; CRIMINAL LAW, 2; TRESPASS, 6.

ELECTIONS.

1. **SUPREME COURT OF NEW YORK**, in an action of *quo warranto* to revise election of a state officer, is not restricted to correcting mistakes of the canvassing officers, but may go behind their returns, and receive evidence establishing what votes were actually cast and identifying the candidates for whom they were in fact intended. *People v. Cook*, 451.
2. **IRREGULARITIES IN CONDUCT OF ELECTION**—such as neglect of inspectors or clerks to take the prescribed oath or to take it in a formal manner; errors in the spelling of names of candidates on ballots cast; action of unauthorized persons (without fraudulent intent), as inspectors, and the like—do not avoid the election, or impair the title to the office of the candidate for whom the majority of votes was actually and intentionally cast. The errors or irregularities which warrant rejecting the ballots are such as operate to deprive lawful electors applying to vote of their privilege, or to receive ballots of persons not entitled to vote. *Id.*

See STATUTES, 2.

EMINENT DOMAIN.

1. STATE MAY RIGHTFULLY AID IN EXECUTION OF PUBLIC WORKS by delegating to a corporation the right of eminent domain, or by an exertion of the taxing power. *Sharpless v. Mayor etc. of Philadelphia*, 759.
2. LEGISLATIVE ACT AUTHORIZING TAKING OF PRIVATE PROPERTY FOR PRIVATE USE WOULD BE UNCONSTITUTIONAL, because it would not be legislation but a mere decree between private parties. But an act authorizing a city to subscribe to railroad stock is no taking in any sense, for any purpose, or for any uses. *Id.*
3. LEGISLATIVE ACT IS NOT TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION, contrary to section 10 of article 9 of the Pennsylvania constitution, when it authorizes a city to subscribe to railroad stock. When property is not seized and directly appropriated to public use, though it be subjected in the hands of the owner to greater burdens than it was before, it is not taken. *Id.*

See DOWER, 2.

ENACTMENT.

See STATUTES, 2.

ENTRY.

See ADVERSE POSSESSION, 2.

EN VENTRE SA MERE.

See PARENT AND CHILD.

EQUITY.

1. EQUITY WILL NOT AFFORD RELIEF TO PARTY when he has adequate relief at law. *Redmond v. Dickerson*, 418.
2. GENERAL CHARGE OF COMBINATION, COLLUSION, AND FRAUD, no matter how often intimated, does not give plaintiff any ground to stand on in a court of equity; he must bring his case within some distinct principle or head of equity jurisdiction. *Lyerly v. Wheeler*, 596.
3. FRAUDULENT COMBINATION TO KEEP PLAINTIFF OUT OF POSSESSION IS NOT COGNIZABLE IN EQUITY, where the plaintiff has not established his title at law, and no irreparable injury is threatened. *Id.*
4. ACTUAL FRAUD IS NOT ESSENTIALLY NECESSARY IN ORDER TO SET ASIDE CONTRACT IN EQUITY. The acts and contracts of persons of weak understanding, and who are therefore liable to imposition, will be held void if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence. *Tracey v. Sacket*, 610.
5. CONTRACT MAY BE SET ASIDE IN EQUITY where there is imbecility or weakness of mind arising from old age, sickness, intemperance, or other cause, and plain inadequacy of consideration; or where there is weakness of mind and circumstances of undue influence and advantage. *Id.*
6. EQUITY WILL AFFORD RELIEF AGAINST PALPABLE MISTAKE appearing upon the face of an executor's account after final settlement and allowance. *Black v. Whitall*, 423.

7. To ENTITLE ONE TO BILL OF PEACE, the complainant must satisfactorily establish his title at law. *Lyerly v. Wheeler*, 596.

See CHARITABLE USES; CORPORATIONS, 1, 5; EXECUTORS AND ADMINISTRATORS, 12; FRAUDULENT CONVEYANCES; INJUNCTIONS; JUDGMENTS, 8; PARTNERSHIP, 9; SPECIFIC PERFORMANCE; SURETYSHIP, 2; TRUST DEEDS, 2; USURY, 1; VENDOR AND VENDEE, 1, 3.

ERROR.

See INJUNCTIONS, 7.

ESTATES FOR YEARS.

See EXECUTIONS, 2, 3.

ESTOPPEL.

1. ESTOPPEL MUST BE CERTAIN TO EVERY INTENT, and not be taken by argument or inference. *Mason v. Alston*, 515.

2. TENANT CAN NOT QUESTION HIS LANDLORD'S TITLE. *Vrooman v. McKaig*, 85.

3. PARTY ACCEPTING DEED IN GOOD FAITH, which does not embrace the identical lands described in the covenant, can not afterwards dispute the same. *Marshall v. Haney*, 92.

See VENDOR AND VENDEE, 4; WILLS, 10.

EVIDENCE.

1. COURTS OF ONE STATE WILL NOT TAKE JUDICIAL COGNIZANCE of any laws of sister state at variance with the common law; but upon common-law questions, the legal presumption is that the common law of a sister state is similar to our own. *Houghtaling v. Ball*, 331.

2. OFFERING OF IMPROPER EVIDENCE BY ONE PARTY can never justify the introduction of similar evidence by the other party; irrelevant testimony can not be admitted as an answer to irrelevant testimony. *Baltimore & S. R. R. Co. v. Woodruff*, 72.

3. REMOTE AND COLLATERAL FACTS AND CIRCUMSTANCES, irrelevant to the issue, are inadmissible in evidence. *Marshall v. Haney*, 92.

4. IT IS NO OBJECTION TO INTRODUCTION IN EVIDENCE OF RECORD OF DEED that the name of one of the subscribing witnesses could not be read without explanatory evidence, and appeared to be a fac-simile of the name on the original deed. *Whitwell v. Emory*, 220.

5. PATENT AMBIGUITIES EXIST OR APPEAR on the face of the writing itself, and as a general rule can not be explained or removed by extrinsic evidence. *Marshall v. Haney*, 92.

6. COURT IN INTERPRETING PATENT AMBIGUITY should ascertain the meaning of the words actually employed, and not what the parties may have secretly intended. *Id.*

7. LATENT AMBIGUITY EXISTS where the description contained in a written contract or other instrument, of the person, place, or thing intended, is applicable with equal certainty to each of several subjects; and extrinsic evidence is admissible to show which of those several subjects was meant by the parties to the instrument. *Id.*

8. TESTIMONY TO REFORM INSTRUMENT IN FAVOR OF MERE VOLUNTEER must be something more than mere declarations; but must be proof of facts

and circumstances *defore* the instrument and inconsistent with it. *Yates v. Cole*, 602.

9. DECLARATIONS OF PARTY ARE ADMISSIBLE AS PART OF RES GESTA, if made at the time of an act done by him, and explanatory thereof, where evidence of such act is itself admissible. *Wetmore v. Mell*, 607.
10. ADMISSION OF IMPROPER DECLARATIONS WILL NOT BE PRESUMED, when it is not made to appear by the bill of exceptions that they were admitted. *Id.*
11. PARTY'S DECLARATIONS ARE NOT ADMISSIBLE IN HIS FAVOR, though accompanied by acts in harmony therewith, to rebut or annul the effect of contrary declarations made by him at other times. *Hunt v. Roylance*, 140.
12. SECONDARY EVIDENCE OF CONTENTS OF BOOKS OF ACCOUNT is not admissible, unless the absence of the books is accounted for. *Id.*
13. ORDINARY RULES OF EVIDENCE MUST NECESSARILY BE DEPARTED FROM when a person has been so injured that he can not give his testimony in the ordinary way. *Commonwealth v. Casey*, 150.
14. DYING DECLARATIONS MAY BE MADE BY SIGNS AS WELL AS BY WORDS; and if a person in a dying condition, and so injured as to be unable to speak, is asked to squeeze the hand of the questioner if it was C. who inflicted the injury, and thereupon does squeeze such hand, this is proper evidence for the consideration of the jury on the trial of C. for murder. *Id.*
15. WHERE RECORD IS SILENT AS TO NOTICE OR MANNER OF SALE, it is competent to introduce parol testimony to prove the manner of sale. *Gelstrop v. Moore*, 254.

See ADVERSE POSSESSION, 4, 11; ASSAULT AND BATTERY, 1; ASSUMPSIT, 1; CRIMINAL LAW, 14-16; ELECTIONS, 1; EXECUTORS AND ADMINISTRATORS, 10; FRAUD; INSURANCE—FIRE, 10, 35, 36; JUDGMENTS, 10; MARRIAGE AND DIVORCE, 4; MARRIED WOMEN; MASTER AND SERVANT, 1; NEGLIGENCE, 4, 5; NEGOTIABLE INSTRUMENTS, 6, 13-15; PHYSICIANS, 5; PLEADING AND PRACTICE, 4, 11, 12, 17-19, 21, 29; RELEASE; SALES, 10, 11; STATUTE OF FRAUDS, 7; TROVER; TRUSTS AND TRUSTEES, 5, 7; WILLS, 6; WITNESSES.

EXAMINATION.

See WITNESSES, 2-4.

EXCEPTIONS.

See EVIDENCE, 10; PLEADING AND PRACTICE, 24-26.

EXCHANGE.

See DECEIT, 2.

EXECUTIONS.

1. SHERIFF WHO SEIZES ON EXECUTION GOODS OF ONE NOT DEBTOR is a trespasser, and one who purchases such goods at the sheriff's sale acquires no title to them as against the owner. And if such purchaser removes the property after the sale, with the assistance of the officer, the owner may recover against them as joint trespassers. *Symonds v. Hall*, 53.
2. TERM FOR YEARS IN LAND, being a chattel, is liable to levy and sale by a constable under a justice's execution. *Doe ex dem. Glenn v. Peters*, 563.

3. TERM FOR YEARS WAS LIABLE AT COMMON LAW TO BE LEVIED ON AND SOLD under a *fiery facias* as a chattel. *Id.*
4. ADVERTISEMENT OF SHERIFF'S SALE WHICH SUFFICIENTLY IDENTIFIES PROPERTY TO BE SOLD is in compliance with the law. A sheriff is not bound to describe the number or character of the buildings to be sold by him. *Allen v. Cole*, 416.
5. ADJOURNMENT OF SHERIFF'S SALE NEED NOT BE PUBLISHED IN NEWSPAPER. A public proclamation at the place where the sale was to be held, that an adjournment had been made, will suffice. *Id.*
6. SHERIFF'S SALE WILL NOT BE SET ASIDE because some of the property disposed of might have sold below its value. *Id.*
7. SHERIFF'S DEED IS VOID WHICH RECITES THAT LAND WAS EXPOSED FOR SALE "at the court-house door in the city of St. Louis, during the — term of the — court of —, for the year eighteen hundred and forty —," under a statute requiring the officer to expose real estate taken under execution to sale at the court-house door on some day during the term of the circuit court for the county where the same is situated, and requiring that the sheriff's deed shall recite the time, place, and manner of the sale. *Tanner v. Stine*, 320.
8. AUTHORITY OF SHERIFF IN SALES OF REAL ESTATE depends on the judgment and execution, and the compliance with certain acts which, for the protection of debtors, the law requires to be performed previous to the sale. *Id.*
9. SHERIFF'S DEED MUST RECITE FROM FACTS ENUMERATED BY STATUTE prescribing its contents, at least those facts the non-performance of which would render the sale void. *Id.*
10. PURCHASER AT SHERIFF'S SALE MAY REJECT SHERIFF'S DEED as not in compliance with law, and his acceptance of it is his own voluntary act, in the performance of which he has a right to control and direct the officer, and he is therefore not entitled to the protection afforded a purchaser in good faith, on the reasonable presumption that the law has been complied with by those intrusted with its execution, and over whose acts he has no control. *Id.*

See EVIDENCE, 15; INJUNCTIONS, 12; PARTNERSHIP, 7; SURETSHIP, 1.

EXECUTORS AND ADMINISTRATORS.

1. ADVANCEMENT MADE DURING LIFE OF TESTATOR is no part of the estate to be administered on by the executor. *Black v. Whitall*, 423.
2. NOTES OF INSOLVENT NON-RESIDENT DEBTOR OF ESTATE may be omitted from the inventory and administrator's account without prejudice to the administrator. *Id.*
3. REPRESENTATIVES OF DECEDENT ARE BOUND TO PERFORM HIS CONTRACTS, not to complete his proposals. *Phipps v. Jones*, 708.
4. EXECUTOR OR ADMINISTRATOR IS NOT BOUND TO ENFORCE COLLECTION OF DOUBTFUL CLAIMS at the expense of the estate without being indemnified for costs. *Sanborn v. Goodhue*, 398.
5. EXECUTOR CAN NOT RETAIN LEGATEE'S SHARE to secure payment of annuity, nor require security for its payment, when a testator bequeathed a certain annuity to his wife, and it was agreed that each legatee pay semi-annually a certain amount to discharge it. *Pelham v. Taylor*, 604.

6. **EXECUTOR HAS NO RIGHT TO REQUIRE BOND FOR FORTHCOMING OF PROPERTY** given to one for life, with a remainder over; that must be given at the instance of the remainderman if there be good ground to fear that the property will be destroyed or taken to parts unknown; *a fortiori* the executor can not require a bond where the property is given with the absolute power of disposition. *Id.*
7. **EXECUTOR WILL NOT BE ALLOWED HIS COSTS** in an action for refusing to come to an account and to deliver over the property, where his reasons for refusing are entirely untenable. *Id.*
8. **ORDER FOR SALE OF REAL ESTATE BY EXECUTOR IS INVALID** unless the directions of the statute have been strictly complied with, and such compliance must be shown by the record. *Gelstrop v. Moore*, 254.
9. **SALE BY EXECUTOR OR ADMINISTRATOR MUST BE MADE ACCORDING TO LAW**, when made in pursuance of decedent's will. *Id.*
10. **STATEMENT THAT EXECUTOR'S SALE WAS REGULARLY MADE** will not be more than *prima facie* evidence of its legality, the acts of the executor in executing an order of sale being a matter *in pais*. *Id.*
11. **SALE OF PERSONALTY BY EXECUTOR** will not be invalid if the order of confirmation should not show that the requisite notice had been given, or that the sale was made in the manner prescribed by law. *Id.*
12. **ADMINISTRATOR CAN NOT JOIN COUNT FOR DEBT DUE HIM INDIVIDUALLY** with one in his representative capacity, either at law or in equity. *May v. Smith*, 594.
13. **EXECUTOR WILL NOT BE PERMITTED TO SET OFF DEBTS** due from an insolvent husband in a bill brought by husband and wife to secure a legacy due the wife. *Black v. Whitall*, 423.

See EQUITY, 6; PLEADING AND PRACTICE, 3; SUBSCRIPTION, 2.

EXEMPLARY DAMAGES.

See ASSAULT AND BATTERY, 2.

EXEMPTIONS.

See PLEADING AND PRACTICE, 10.

EXPERTS.

See WITNESSES, 1.

FACTORS.

1. **FACTOR CAN NOT DELIVER PRINCIPAL'S GOODS IN SATISFACTION OF HIS OWN DEBT** so as to pass title, though the accounts between the factor and principal may be in the factor's favor. *Benny v. Pegram*, 298.
2. **DELIVERY OF PRINCIPAL'S GOODS BY FACTOR IN PAYMENT OF HIS OWN DEBT** is not a sale, and does not divest the principal's title. *Id.*
3. **FACTOR IN ORDER TO PASS TITLE OF PRINCIPAL** must sell the property according to the usages of trade. *Id.*
4. **FACTOR CAN NOT DELIVER GOODS OF PRINCIPAL IN SATISFACTION OF HIS OWN DEBT**, or sell them in an irregular manner so as to pass the title, though he have a lien on the goods for his advances. *Id.*
5. **FACTOR MAY PROTECT HIMSELF TO EXTENT OF HIS ADVANCES** by selling his principal's goods. *Id.*

6. **WHERE FACTOR HAS DELIVERED GOODS OF PRINCIPAL IN SATISFACTION OF HIS OWN DEBT**, although the factor has accepted and paid a bill of the principal drawn on account of the consignment, which exceeds in amount the value of the goods delivered, and there has been no appropriation of that payment to any particular items of the account between the principal and factor, nevertheless that amount will not be appropriated to payment for the goods so delivered by the factor. *Id.*
7. **CREDITOR OF FACTOR ACQUIRES NO TITLE TO GOODS OF PRINCIPAL** delivered to him in payment of factor's debt, unless the principal has received payment for the whole consignment from which the goods so delivered are taken, or has ratified the factor's act. *Id.*
8. **TROVER CAN NOT BE MAINTAINED AGAINST CONSIGNEE'S PLEDGERS BY CONSIGNOR OF SPECIFIC BARRELS OF FLOUR** where the consignor drew his draft on the consignee "against the flour," which the former discounted and the latter accepted, but did not pay at maturity; and where attached to the draft was a warehouse receipt and a certificate executed by the consignor, by which he agreed to hold the flour subject to the sole order of the consignee or his assigns, and to ship the same to him by the first opportunity, and certified that the draft had been drawn as above, and that the receipt and certificate should remain attached thereto, and be evidence of a lien on the flour in favor of the holders of the draft until payment, but reserved to the consignee the right to sell the flour, holding the proceeds instead thereof in trust for the holders of the draft. The consignor has so far parted with the right of property and of possession, which are so far vested in the holders of the draft that the consignor can not maintain the action. *De Wolf v. Gardner*, 165.

See AGENCY, 4, 5.

FALSE REPRESENTATIONS.

See DECEIT, 2.

FEEES.

See ATTACHMENTS, 5.

FEMES COVERT.

See MARRIED WOMEN.

FENCES.

See ADVERSE POSSESSION, 4, 5.

FINAL JUDGMENTS.

See JUDGMENTS, 4; PLEADING AND PRACTICE, 23.

FINES.

See ASSAULT AND BATTERY, 2; CONTEMPT, 1.

FIRE INSURANCE.

See INSURANCE—FIRE.

FIREES.

See NEGLIGENCE, 7, 8.

FISHERY.

See WATERCOURSES, 1, 3, 6-8.

FIXTURES.

1. **FIXTURE IS ARTICLE WHICH WAS CHATTEL**, but which, by being physically annexed or affixed to the realty, became accessory to it, and part and parcel of it. *Teaff v. Hewitt*, 634.
2. **CRITERION OF FIXTURE IS UNITED APPLICATION OF REQUISITES**: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Appropriation to the use or purpose of that part of the realty with which it is connected; 3. Intention of the party making the annexation to make the article a permanent accession to the freehold; but this criterion is subject to the qualification that the rights of the parties are liable to be controlled by an established custom or special agreement of the parties. *Id.*
3. **EXTENT AND MODE OF ANNEXATION OF ARTICLE TO FREEHOLD DEPEND** much upon the nature of the article itself, the use to which it is applied, and other attending circumstances. *Id.*
4. **INTENTION TO MAKE ARTICLE PERMANENT ACCESSION TO REALTY MUST AFFIRMATIVELY AND PLAINLY APPEAR** to change the nature and legal qualities of a chattel into those of a fixture; and if it be a matter left in doubt and uncertainty, the legal qualities of the article are not changed, and it must be deemed a chattel. *Id.*
5. **REAL ESTATE, WITH PERSONAL PROPERTY RETAINING ALL ESSENTIAL QUALITIES OF CHATTELS, MAY BE UNITED** by a manufacturing establishment in the same pursuit and for producing the same result, without either being made accessory to the other. *Id.*
6. **MACHINERY IN FACTORY IS NOT FIXTURE**, where it is connected with the motive power by means of bands and straps, and attached to the building only so far as to confine the different parts in their proper places for use, and is subject to removal, as the interests of business or convenience may require, without injury to the machinery itself or the building. *Id.*
7. **MACHINERY NOT AFFIXED TO FREEHOLD IS NOT COVERED BY MORTGAGE** which describes the mortgaged premises as a certain lot "on which is erected a woollen manufactory." *Id.*
8. **CRITERION OF FIXTURE IN MANUFACTORY OR MILL IS NOT DIFFERENT** from that which applies to articles attached to the realty under other circumstances. *Id.*

FOREIGN CREDITORS.

See BANKRUPTCY AND INSOLVENCY, 4, 5.

FORGERY.

See CRIMINAL LAW, 9.

FRANCHISES.

NO GRANT OF SOVEREIGN POWER SHOULD BE SO CONSTRUED AS TO DESTROY OR IMPAIR ANY RIGHT held in trust for the common benefit of the people, if it is capable of any other construction. *Moulton v. Libbey*, 57.

See INJUNCTIONS, 10.

FRAUD.

1. **ISSUE INVOLVING ACTUAL FRAUD** is wholly unsustained by evidence of mere irregularities unaccompanied by fraudulent intent, or by proof of fraudulent intent unaccompanied by acts done for carrying it into effect; and if either be the only proof offered by the party charging fraud, the judge may direct a verdict for the other party. *People v. Cook*, 451.
 2. **EVERY INTENDMENT IS MADE AGAINST PARTY GUILTY OF SUPPRESSION of a fact.** *State v. McIntire*, 566.
- See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 1; **CRIMINAL LAW**, 7; **DECEIT**; **EQUITY**, 2, 3, 4; **GIFTS**, 1; **INSURANCE—FIRE**, 20, 29, 30; **INSURANCE—MARINE**, 2; **PLEADING AND PRACTICE**, 8; **RELEASE**; **SALES**, 1–4, 8; **TRUST DEEDS**, 2.

FRAUDULENT CONVEYANCES.

QUESTION WHETHER CONVEYANCES ARE FRAUDULENT AS TO CREDITORS under the statute of Elizabeth, when presented collaterally in a suit already constituted in a court of equity, is one which that court will either decide or have tried at law; but equity will not take a distinct and independent jurisdiction, unconnected with any other equitable ingredient, in order to try a mere question of fraud against creditors, as the latter have a clear remedy at law. *Lyerly v. Wheeler*, 506.

See **MORTGAGES**, 1.

GARNISHMENT.

See **ATTACHMENTS**; **COSTS**, 3.

GENERAL ISSUE.

See **ATTACHMENTS**, 7.

GIFTS.

1. **GIFT OF PERSONAL PROPERTY, ACCOMPANIED BY DELIVERY**, is **VALID** and irrevocable, unless prejudicial to creditors, or the donor was under a legal incapacity or was circumvented by fraud. *Sanborn v. Goodhue*, 398.
2. **TO RENDER GIFT OF PERSONALTY PERFECT**, there must be an actual delivery of the property; but where the same is incapable of actual delivery, there must be some act equivalent to it. *Id.*
3. **WHERE GIFT IS ACCOMPANIED BY DELIVERY**, the subsequent execution of a will by the donor will not render the gift void, even though the property may fall within the provisions of the will. *Id.*

See **PARENT AND CHILD**; **POWERS**.

GRANTS.

See **FRANCHISES**.

GROWING TIMBER.

WHERE TIMBER, OR PRODUCE OF LAND, OR OTHER THING ANNEXED TO FREEHOLD, is sold specifically, whether it is to be taken by the vendee, under a special license to enter for that purpose, or whether it is to be severed from the soil by the vendor, in the contemplation of the parties it is still evidently and substantially a sale of goods only. *Smith v. Bryan*, 103.

See **STATUTE OF FRAUDS**, 3; **TRESPASS**, 3.

GUARANTY.

1. NOTICE TO GUARANTOR IS UNNECESSARY where his undertaking is absolute, but where his undertaking is collateral, notice must be given within a reasonable time, or it must appear that the situation and circumstances of the parties are such that no injury has resulted to the guarantor from the want of notice. *Beebe v. Dudley*, 341.
2. OBJECT OF NOTICE TO GUARANTOR is to let him know that he is relied upon for payment; and it should be given to him whenever it would be of any advantage to him to have it, that he may, if possible, secure himself against liability. *Id.*
3. NOTICE TO GUARANTOR IS UNNECESSARY UPON INSOLVENCY of the person for whom the undertaking was made. *Id.*
4. NEGLIGENCE TO GIVE NOTICE TO GUARANTOR MUST PRODUCE SOME LOSS or prejudice, otherwise notice and demand before the action is brought is sufficient. *Id.*
5. UNDERTAKING OF GUARANTOR IS COLLATERAL AND NOT ABSOLUTE when, for value received, he guarantees to pay the plaintiff for two thousand dollars' worth of goods, delivered to one Dudley when he may call for them; especially when the facts show that the plaintiffs regarded Dudley as the principal in the transaction, and the credit was given to him. *Id.*

GUARDIAN AND WARD.

See NEGOTIABLE INSTRUMENTS, 22.

HABEAS CORPUS.

See CONTEMPT.

HIGHWAYS.

1. ACTION LIES AS WELL FOR DAMAGE TO ADJOINING PROPERTY by stopping or impeding the travel on, to, or from a street or highway as for any other damage that can be done to property, although the property injured may not be touched by the obstruction. *Little Miami R. R. Co. v. Naylor*, 667.
2. MUNICIPAL CORPORATION, EMPOWERED THOUGH NOT COMMANDED BY STATUTE TO KEEP STREETS IN REPAIR, is liable in damages to a traveler who, without fault on his part, sustains injury from a defect in a public way which the proper officers have neglected to repair. *Hutson v. Mayor etc. of N. Y.*, 526.
3. ONE WHO VOLUNTARILY LEAPS FROM WAGON TO ESCAPE from an apparently greater peril occasioned by a defect in a highway may recover damages for injuries suffered by him, under a statute making a town liable for injuries caused "by reason of any defect or want of repair in any highway," although neither he nor the wagon come in contact with the defect, provided the circumstances were such as to justify his conduct in leaping from the wagon. *Lund v. Tyngsborough*, 159.
4. UNDER COMPLAINT FOR DAMAGES SUSTAINED BY BEING THROWN FROM WAGON by reason of its being brought into contact with a defect in a highway, the plaintiff is not entitled to prove damages arising from his voluntarily leaping from such wagon to avoid injuries rendered imminent by such defect. *Id.*

See INJUNCTIONS, 9, 10; RAILROADS, 3, 4; WATERCOURSES, 10-15.

HOMICIDE.

See **CRIMINAL LAW**, 10-12, 14-16; **EVIDENCE**, 14.

HUSBAND AND WIFE.

See **DOWER**; **EXECUTORS AND ADMINISTRATORS**, 13; **MARRIED WOMEN**; **WILLS**, 2, 5.

ILLEGAL CONTRACTS.

See **BANKRUPTCY AND INSOLVENCY**, 2; **CONFLICT OF LAWS**, 2; **CONTRACTS**, 6, 7.

IMPLIED COVENANTS.

See **DEEDS**, 4,

IMPROVEMENTS.

See **CONSTITUTIONAL LAW**, 15-17; **TAXATION**, 6.

INCUMBRANCES.

See **CO-TENANCY**, 2.

INDEMNITY.

See **INSURANCE—FIRE**, 26; **STATUTE OF FRAUDS**, 5.

INDICTMENT.

See **ASSAULT AND BATTERY**, 1; **CRIMINAL LAW**, 2, 5.

INDORSEMENTS.

See **NEGOTIABLE INSTRUMENTS**, 1, 7-12, 18, 22; **SURETYSHIP**.

INFANCY.

1. MINOR BEFORE ARRIVING AT FULL AGE MAY RESCIND SALE of personal property, made on a valuable consideration but without fraud on his part. *Carr v. Clough*, 345.
2. INFANT RESCINDING CONTRACT MUST RESTORE PROPERTY OR CONSIDERATION received before he can maintain his action for the property sold. *Id.*
3. IF INFANT DISAFFIRMS CONTRACT AND REFUSES PAYMENT on the demand of the adult for payment, or if suit be brought against him and he pleads infancy and avoids the debt, the adult may thereafter, in case the property be in the infant's possession, maintain replevin therefor, or demand the property, and upon refusal, bring trover and recover its value, *semble*. *Id.*
4. UPON RESCISSION OF CONTRACT BY INFANT AND RESTORATION of the property or consideration received by him, or an offer to restore the same, the infant may maintain a special action on the case for the damages sustained, or may bring trover upon showing a conversion of the property. *Id.*
5. INFANT RESCINDING CONTRACT OF SALE CAN NOT MAINTAIN TROVER against the purchaser, where, before the rescission, he made a *bona fide* sale of the property to a third person; but if the sale was invalid, the action would lie. *Id.*

See **EASEMENTS**, 3.

INJUNCTIONS.

1. LESSOR MAY BY INJUNCTION PREVENT HIS LESSEE, or those claiming or holding under him, or acting by his authority, from converting the demised premises to uses inconsistent with the terms of the contract, and from making material alterations for such purposes, and committing other kinds of waste. *Maddox v. White*, 67.
2. SUBLESSEE MAY BE RESTRAINED BY INJUNCTION from violating the stipulations in the original lease without making the original lessee a party. *Id.*
3. INJUNCTION AGAINST DESTRUCTIVE TRESPASS DOES NOT LIE when complainant has not established his title at law, and no irreparable injury is threatened. *Lyerly v. Wheeler*, 596.
4. INJUNCTION WILL NOT LIE FOR EVERY COMMON TRESPASS, where it is only contingent and temporary; but if it continue so long as to become a nuisance, an injunction will then be granted. *Whitfield v. Rogers*, 244.
5. PRIVATE INDIVIDUAL MAY OBTAIN INJUNCTION TO PREVENT PUBLIC MISCHIEF by which he is affected in common with others. *Id.*
6. JURISDICTION EXISTS, IN SUCH SENSE AS TO RENDER INJUNCTION OBLIGATORY, when the court granting it has authority to decide whether the application for it shall be granted; it does not depend on the correctness of the decision. *People v. Sturtevant*, 536.
7. ERROR IN DECISION GRANTING INJUNCTION CAN NOT BE ASSIGNED AS EXCUSE for disobeying it; the order, if within the power of the court, must be obeyed until vacated or reversed. *Id.*
8. COURTS OF EQUITY HAVE GENERAL JURISDICTION TO GRANT INJUNCTIONS to restrain public nuisances. *Id.*
9. JURISDICTION OF NEW YORK SUPERIOR COURT UNDER CODE OF PROCEDURE as existing in 1852-3, to enjoin the municipal officers from granting the use of a city street for a railroad, explained. *Id.*
10. GRANT OF FRANCHISE OR LICENSE TO LAY RAILROAD TRACKS and run cars in a city is not an act of legislative power of the mayor and common council such as is exempt from judicial control; but may, in a proper case, be restrained by a court of competent jurisdiction. *Id.*
11. INJUNCTION ADDRESSED TO MAYOR, ALDERMEN, AND COMMONALTY OF CITY, duly served on the proper officers of the corporation, is obligatory upon all officers and agents of the city having knowledge of it, in such sense that any of them taking part in a violation may be individually punished for contempt, though he was not individually a party to the injunction suit. *Id.*
12. DEFENDANTS ARE NOT ENTITLED TO DECREE FOR AMOUNT OF THEIR JUDGMENTS AND PENALTY, under section 4 of the Ohio act of 1845, where an injunction against selling property on execution is dissolved as to part only, and the property released has not diminished in value in consequence of the injunction, but has been sold on execution after the dissolution of the injunction, and the proceeds applied on the judgments. *Teas v. Hewitt*, 634.

INSANITY.

See INSURANCE—LIFE.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See COMMON CARRIERS, 6; FRAUD, 1; INSURANCE—FIRE, 18; NEGOTIABLE INSTRUMENTS, 5; PLEADING AND PRACTICE, 16-18, 20-23, 25, 31.

INSURANCE—FIRE.

1. CONTRACT OF INSURANCE IS TO BE INTERPRETED ACCORDING TO LAWS and with reference to the usages and practice of the state in which it is to take effect, by the counter-signature of the agent of the insurance company and the delivery of the policy by him, although the policy was dated in another state and signed by the president and secretary there. *Daniels v. H. R. F. I. Co.*, 192.
2. WARRANTY IN CONTRACT OF INSURANCE MUST BE EMBRACED IN POLICY ITSELF, or be made in legal effect a part of the policy, by words of reference where the stipulation is contained in another instrument. *Id.*
3. DIFFERENCE BETWEEN EFFECT OF WARRANTY AND REPRESENTATION IN INSURANCE IS, that if the statement of any fact, however unimportant, is a warranty, it avoids the policy if it happens to be untrue; but if it is a representation, and is untrue, the policy will not be avoided if it is not willful or if not material. *Id.*
4. STIPULATIONS IN APPLICATIONS FOR INSURANCE ARE TO BE CONSIDERED REPRESENTATIONS rather than warranties, in all cases where there is any room for construction. *Id.*
5. MISREPRESENTATION IN INSURANCE IS STATEMENT OF SOMETHING AS FACT which is untrue, and which the assured states, knowing it to be untrue, with an intent to deceive, or which he states positively as true without knowing it to be true, and which has a tendency to mislead, such fact in either case being material to the risk. *Id.*
6. CONCEALMENT IN INSURANCE IS DESIGNED AND INTENTIONAL WITHHOLDING OF FACT MATERIAL TO RISK, which the assured in honesty and good faith ought to communicate. *Id.*
7. FACT MUST BE REGARDED AS MATERIAL TO RISK in insurance when knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. *Id.*
8. BURDEN OF PROOF IS ON INSURANCE COMPANY TO SHOW FALSITY OF REPRESENTATION, or the failure to comply with an executory stipulation, as well as the materiality of the representation or stipulation to the risk; and it is a question for the jury in either aspect. *Id.*
9. NEGLIGENCE OF SERVANTS, WHEREBY REPRESENTATION OR STIPULATION IS NOT COMPLIED WITH, WILL NOT AVOID POLICY of fire insurance, unless, indeed, the habitual or frequent carelessness of such servants in performing their duties may become the negligence of the employers, whose duty it is to have a reasonable vigilance over and employ faithful servants. *Id.*
10. EVIDENCE OF USAGE OF WORDS IN PECULIAR SENSE IN APPLICATION FOR INSURANCE IS ADMISSIBLE, where, although such words severally and as first read seem plain, an ambiguity becomes apparent when they are applied to the subject-matter; and it is for the jury to decide whether, according to the true meaning of the language used, a representation therein contained was substantially true when made, and substantially complied with afterwards. *Id.*

11. **GENERAL USE OF WORDS AMONG MANUFACTURERS NEED NOT BE KNOWN TO INSURERS** to effect a contract of insurance on manufacturing property in which they are contained. The legal presumption is that the words were understood by the insurers. *Id.*
12. **INSURANCE EXPERT MAY BE ASKED WHETHER RISK WAS INCREASED** by a partition in the basement of the insured building, and the necessity for another cask of water was thereby created, if there were openings in the partition of sufficient size to permit a cask to be easily rolled through, where water-casks were represented to be in each room, but were in fact only in each story. *Id.*
13. **INSURANCE EXPERT MAY BE QUESTIONED BY PLAINTIFF CONCERNING HIS EXAMINATION OF INSURED BUILDING** for the insurance company and the objects the building then contained, in an action on a policy, for the purpose of proving the existence of the objects described in the application, and of showing his relation to the parties, and his means of observation and recollection. *Id.*
14. **MATERIAL REPRESENTATIONS MUST BE SUBSTANTIALLY TRUE.** *Hartford P. Ins. Co. v. Harmer*, 684.
15. **REPRESENTATION IN APPLICATION FOR INSURANCE THAT ASHES ARE "THROWN OUT,"** even if construed as a warranty, must be considered as the affirmation of a previous habit of disposing of the ashes, and leaving some of them in the building occasionally for special or extraordinary purposes, or accidentally, would not avoid the policy. *Id.*
16. **REPRESENTATION AS TO INCUMBRANCES ON PROPERTY INSURED, THOUGH UNTRUE,** will not avoid the policy, if in fact written from his own knowledge by the agent of the underwriter, who was fully advised of all the facts, no fraud appearing on the part of the assured. *Id.*
17. **NO PART OF APPLICATION OR SURVEY BELONGS TO POLICY,** so as to become warranty, unless it is expressly made part of it by unequivocal language appearing on the face of the policy. *Id.*
18. **IN DETERMINING MATERIALITY OF CONCEALED FACT** that house insured was before the insurance on fire, caused, in the opinion of the assured, by incendiaries, the jury may be instructed to inquire for and be governed by the true cause of the fire, and not by the belief of the assured as to the cause. *Id.*
19. **ASSURED IS NOT BOUND TO COMMUNICATE HIS OWN EXPECTATIONS** and opinions and speculations upon facts. *Id.*
20. **FAILURE TO DISCLOSE EVERY FACT MATERIAL TO RISK** upon which information is not asked for or fraudulently suppressed will not avoid a fire insurance policy, though the rule is different in marine insurance; all that is required is, that the assured shall not misrepresent or designedly conceal any such facts, and that he answer fully and in good faith all inquiries addressed to him by the insurer, and that he do not withhold information of such unusual and extraordinary circumstances of peril to the property as could not with reasonable diligence be discovered by the insurer or reasonably anticipated by him as a foundation for specific inquiries. *Per Ranney, J. Id.*
21. **IT IS, IN GENERAL, SUFFICIENT IF SUBJECT-MATTER OF INSURANCE** and the nature of the risk are set forth in the policy, without any representation of the nature or character of the interest for which the insurance is intended as a protection. *Id.*

22. **MERE EXPRESSIONS IN POLICY WHICH SEEM TO CONVEY ASSERTION OF EXCLUSIVE OWNERSHIP**, such as "his stock of tobacco," will not avoid the policy, though it appear that the assured has only a partnership interest, for such expressions are only intended to identify and describe the property insured, and not to stipulate as to the interest of the insured. *Id.*
23. **CONDITION AGAINST KEEPING GUNPOWDER FOR SALE OR ON STORAGE** upon the premises insured does not cover the case where gunpowder is merely kept upon the premises, but neither on storage nor for sale. *Id.*
24. **OBJECTIONS TO PRELIMINARY PROOFS OF LOSS ARE WAIVED** if, after they are rendered by the assured, he is distinctly informed that his claim will be determined upon the merits, and the insurer finally refuses to pay, on the ground that there is no merit in the claim. *Id.*
25. **ABSOLUTE ASSIGNMENT OR SALE OF INSURED PROPERTY AFTER INSURANCE IS MADE** takes away the insurable interest of the vendor, and creates a bar to the right of action on the policy, unless by some means its existence has been preserved for the benefit of the assignee. *Morrison's Adm'r v. Tenn. M. & F. Ins. Co.*, 299.
26. **CONTRACT OF INSURANCE IS CONTRACT OF INDEMNITY.** *Id.*
27. **CONVEYANCE OF SUBJECT-MATTER OF POLICY DOES NOT BAR RECOVERY BY INSURED** to the extent of his actual loss, provided it does not exceed the sum insured, if the conveyance be in the nature of a mortgage, or in trust, with a resulting trust to the insured. *Id.*
28. **INSURED WHO HAS CONVEYED INSURED PROPERTY RETAINS INSURABLE INTEREST**, and may recover his actual loss, not exceeding the amount insured, when the grantee, at the time of the conveyance, reconveys the property to a third person as trustee for the insured to secure the payment of the purchase money. *Id.*
29. **FRAUDULENT CONCEALMENT OR MISREPRESENTATION IN REGARD TO OWNER'S INTEREST**, to the prejudice of the underwriter, will avoid the policy. *Id.*
30. **FAILURE OF INSURED TO DISCLOSE NATURE AND EXTENT OF HIS INTEREST** in property insured will not avoid the policy, in the absence of fraud. The insurer may protect himself by requiring a description of the interest of the applicant. *Id.*
31. **WHERE INSURED HAS CONVEYED PROPERTY INSURED, RIGHT OF INSURER TO BE SUBROGATED** to the securities of the insured for the payment of the purchase money can not arise until there is a recovery of the insurance, if at all. *Id.*
32. **EXPRESS WARRANTY IN INSURANCE POLICY IS STIPULATION INSERTED IN WRITING** on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends, or it may be contained in another paper if distinctly referred to in the policy, and expressly made part of the contract between the parties; but a simple reference is not enough. *Hartford P. I. Co. v. Harmer*, 684.
33. **REPRESENTATION IS ORAL OR WRITTEN STATEMENT RESPECTING FACTS CONCERNING RISK**, made by the assured to the underwriter before the subscription of the policy, and as a part of the preliminary proceedings which propose the contract. *Id.*
34. **ANSWERS TO QUESTIONS IN APPLICATION FOR INSURANCE NOT REQUIRED BY CONDITIONS** of the policy are mere material representations, and not war-

rattles; nor are they incorporated into the contract or made part of the conditions upon which it is founded by being contained in a paper called a "survey," to which the policy refers in words, "For a more particular description of said premises, see survey No. 74, furnished by the insured, which is hereby made a part of this policy," nor by a condition in the policy that a survey and description shall be deemed a part of the policy and warranty on the part of the assured. *Id.*

85. EVIDENCE OF LOCAL CUSTOM AMONG INSURERS AS TO MATERIALITY OF UNDISCLOSED FACT respecting the risk is inadmissible in an action on a policy of insurance if not communicated to the insured, or of such general notoriety as to afford any presumption of knowledge on his part. *Id.*
86. OPINIONS OF WITNESSES ENGAGED IN INSURANCE BUSINESS, that the fact that a building insured had shortly before the risk was taken been on fire was material to the risk, and would have influenced the judgment of a prudent underwriter, are inadmissible in an action upon the policy. *Id.*
87. WHERE POLICY OF INSURANCE DECLARES THAT IF ASSURED "SHALL MAKE ANY OTHER INSURANCE on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same indorsed in writing on this instrument or otherwise acknowledged by them in writing, this policy shall cease and have no further effect," if the assured obtains further insurance, and does not have it indorsed on the policy or otherwise acknowledged in writing, the policy becomes void, though a memorandum of such additional insurance was exhibited to an agent of the company, who said he had entered it and would have it indorsed on the policy. *Worcester Bank v. Hartford F. I. Co.*, 145.
88. POLICY IS AVOIDED BY EFFECTING SUBSEQUENT INSURANCE, of which no notice was given, and no acknowledgment thereof made, where such policy was to cease if the assured should thereafter make any other insurance on the property without notice given to the company, and the same indorsed on the policy or otherwise acknowledged in writing, and where the application covenanted that the property was at the time insured for certain amounts in certain companies, but in fact no such insurance existed, and the subsequent insurance was made in other companies, although for an amount not exceeding the amounts specified in the application as existing. The stipulation can not be so construed as avoiding the policy only in case insurance exceeding the amounts stated in the application be thereafter effected without notice thereof given. *Conway Tool Co. v. Hudson River Ins. Co.*, 172.

INSURANCE—LIFE.

- CONDITION IN LIFE POLICY THAT IT SHALL BE VOID if the insured "shall die by his own hand" requires a voluntary act of self-destruction; and does not take effect on his committing suicide while insane. *Breasted v. F. L. & T. Co.*, 482.

INSURANCE—MARINE.

- I. BARRATEY IS FRAUDULENT AND INJURIOUS CONDUCT BY MASTER, acting in the relation of master to the owners, contrary to the orders and instructions, against the interest and rights of the owners, and without their consent. *Wilson v. General Mut. Ins. Co.*, 188.

2. **INSURANCE AGAINST BARRATRY OF MASTER DOES NOT COVER LOSS** through the fraud and misconduct of such master, where he is himself part owner of the vessel. Barratry can not be committed by a master who is himself a part owner. *Id.*

See **INSURANCE—LIFE**, 20.

INTEREST.

See **ATTACHMENTS**, 5; **USURY**; **WILLS**, 4

INTERLOCUTORY DECREES.

See **JUDGMENTS**, 5.

INTOXICATING LIQUORS.

1. **CONTRACTS BY PERSON WHO HAS BEEN FOUND HABITUAL DRUNKARD** can not be sustained by proof that the promisor was sober when they were made; the incapacity is continuous until the commission is superseded. *Wadsworth v. Sharpsteen*, 499.
2. **INQUEST AND FINDING OF HABITUAL DRUNKENNESS** suspends the capacity of the subject of them to make contracts and transact business, as toward all persons, whether they have had actual notice of the proceedings or not. *Id.*

See **CONSTITUTIONAL LAW**, 2; **CONTRACTS**, 7

INVENTORY.

See **EXECUTORS AND ADMINISTRATORS**, 2

IRRELEVANT TESTIMONY.

See **EVIDENCE**, 2, 3.

JOINDER OF ACTIONS.

See **EXECUTORS AND ADMINISTRATORS**, 12; **MARRIAGE AND DIVORCE**, 2; **PARTNERSHIP**, 3.

JOINT TRESPASSERS.

See **EXECUTIONS**, 1.

JUDGMENTS.

1. **JUDGMENT DEFINED.** *Whitwell v. Emory*, 220.
2. **ORDER FOR JUDGMENT IS NOT JUDGMENT, NOR DOES ENTRY** of such order partake of the nature and qualities of a judgment, as a judgment must clearly ascertain not only the determination of the court upon the subject submitted, but the parties in favor of and against whom it operates. *Id.*
3. **JUDGMENT BY CONFESSION CAN NOT BE IMPEACHED BY OTHER CREDITORS** of the judgment debtor on the ground of insufficiency of the statement. *Murray v. Judson*, 516.
4. **FINAL DECREE IS ONE WHICH DETERMINES AND DISPOSES OF WHOLE MERITS OF CAUSE** before the court, or a branch of the cause which is separate and distinct from the other parts of the case, reserving no further questions or directions for future determination. *Teaff v. Hewitt*, 634.

5. **INTERLOCUTORY DECREE IS ONE WHICH LEAVES FOR FUTURE DETERMINATION EQUITY OF CASE**, or some material question connected with it. *Id.*
 6. **JUDGMENT OF COURT OF COMPETENT JURISDICTION, ACTING WITHIN SCOPE OF ITS AUTHORITY**, is conclusive and binding until reversed or set aside, either by itself or by the proper appellate court. *Ex parte Adams*, 234.
 7. **TITLE BY JUDGMENT GIVES ABSOLUTE RIGHT TO PROPERTY**. *Acheson v. Miller*, 663.
 8. **BILL LIES TO EXECUTE DECREE** where, owing to the neglect of the parties to proceed under it, their rights have become embarrassed by subsequent events, and a new decree is necessary to ascertain them, and where the decree is not unjust or inequitable. *Wright v. Bowden*, 600.
 9. **JUDGMENT RENDERED FOR WANT OF SUFFICIENT DEFENSE**, under act requiring nature and character of the defense to be sworn to, will not be reversed because the circumstances of the case were such that the defendant could not know with certainty whether he had a good defense or not. The defendant should ask for further time, first satisfying the court that he has made diligent effort to inform himself, and has failed, not through his own laches; or if the defense depends upon an inspection of documents in the possession of the adverse party, and such inspection has been demanded and refused, he should move for an indefinite suspension of the judgment. *Lord v. Ocean Bank*, 728.
 10. **REVERSAL OF DECREE UPON BILL OF REVIEW WILL NOT BE JUSTIFIED** by mere difference of opinion as to the weight of the evidence. *Tracey v. Sacket*, 610.
 11. **WHERE TWO PARTIES MADE PAROL AGREEMENT TO PURCHASE LAND JOINTLY**, but the purchase was made by one alone on his own credit, who gave bond for the purchase money, occupied the property many years, sold and conveyed a part of it, but afterwards proving unable to advance his share of the purchase money, it was advanced by the other, who took a conveyance of the whole in fee: *Held*, that judgments rendered against the party who made the purchase prior in date to the conveyance are liens upon his interest in the land; but as to those rendered subsequently to that period, the party to whom the conveyance is made is entitled to relief by perpetual injunction. *Hollida v. Shoop*, 88.
- See **CONTEMPT**; **COSTS**; **EXECUTIONS**, 12; **PLEADING AND PRACTICE**, 27, 28, 31; **SURETYSHIP**, 1; **TRESPASS**, 4, 6, 9; **USURY**, 1; **WILLS**, 10.

JUDICIAL NOTICE.

See **EVIDENCE**, 1.

JUDICIAL SALES.

See **EVIDENCE**, 15; **EXECUTIONS**; **EXECUTORS AND ADMINISTRATORS**, 8-11.

JURISDICTION.

1. **ADMIRALTY AND MARITIME JURISDICTION COMPREHENDS NAVIGABLE RIVERS** as high up as the tide ebbs and flows, although it should be within the body of a county. *Baker v. Hoag*, 431.
2. **ADMIRALTY JURISDICTION OF "CERTAIN CASES UPON THE LAKES AND NAVIGABLE WATERS connecting the same,"** given by act of congress to the United States district court, is not an exclusive jurisdiction, but concur-

- rent merely with the common-law and statutory remedies authorized in the courts of the several states. *Thompson v. Steamboat J. D. Morton*, 658.
3. **MERE FACT THAT REMEDY UNDER STATE LAW FOR COLLECTION OF CLAIMS AGAINST VESSELS** is a proceeding *in rem* instead of being *in personam* furnishes no sound reason for giving an exclusive jurisdiction to the United States courts. *Id.*
- See **CHARITABLE USES**; **CONTEMPT**; **EQUITY**; **FRAUDULENT CONVEYANCES**; **INJUNCTIONS**, 6, 8, 9; **JUDGMENTS**, 6; **PLEADING AND PRACTICE**, 6.

JURY AND JURORS.

1. **ESSENTIAL FEATURES OF TRIAL BY JURY AS KNOWN AT COMMON LAW** were intended to be preserved and its benefits secured to the accused in all criminal cases by the provisions of the Ohio constitution, that "the right of trial by jury shall be inviolate," and that "in any trial in any court" the party accused shall be allowed "a speedy public trial by an impartial jury of the county." *Work v. State*, 671.
2. **NUMBER OF JURY AT COMMON LAW MUST BE TWELVE**, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had. *Id.*
3. **DIMINISHING NUMBER OF JURORS IMPAIRS RIGHT OF TRIAL BY JURY.** *Id.*
4. **NUMBER OF JURORS NECESSARY AT COMMON LAW CAN NOT BE DIMINISHED**, nor a verdict authorized short of a unanimous concurrence of all the jurors by the general assembly of Ohio; and the statute of 1853 authorizing a conviction upon the finding of a jury of six is void. *Id.*
5. **ACT ALLOWING JURIES OF SIX MEN BEFORE JUSTICES OF PEACE** is not unconstitutional, under a constitution protecting right of jury trial as at common law, for juries were not required in these courts at common law, and in such case a jury of any number may be authorized within the discretion of the legislative body. *Id.*
- See **ADVERSE POSSESSION**, 7; **CRIMINAL LAW**, 10-13; **FRAUD**, 1; **INSURANCE—FIRE**, 8, 10; **MARRIED WOMEN**; **PLEADING AND PRACTICE**, 12, 16-18, 20-23, 25, 29, 30, 31; **SALES**, 3; **STATUTE OF FRAUDS**, 2; **TRESPASS**, 5.

JUSTICES OF THE PEACE.

See **EXECUTIONS**, 2; **JURY AND JURORS**, 5; **PLEADING AND PRACTICE**, 6.

LANDLORD AND TENANT.

1. **WHERE LEASE OF FARM PROVIDES THAT HALF THE HAY RAISED ON IT** shall be consumed thereon by cattle kept by the lessee, and the other half be divided between the lessor and the lessee, the property in the whole of the hay remains in the lessee until the division is made. The lessor has no claim *in rem* upon it before division. When the division is made under the contract, the portions divided vest separately in the lessor and lessee, but the undivided half to be consumed on the farm still remains the property of the lessee. *Symonds v. Hall*, 53.
2. **TENANT FROM YEAR TO YEAR**, holding over without any new stipulations between the parties, impliedly holds subject to all the covenants in his expired contract or lease. *Vrooman v. McKaig*, 85.
3. **ACTION FOR USE AND OCCUPATION MAY BE MAINTAINED** by landlord against a tenant who leaves the premises without giving due notice of his intention to quit. *Walker v. Furbush*, 148.
- See **ESTOPPEL**, 2; **INJUNCTIONS**, 1, 2; **NEGLIGENCE**, 3.

LATENT AMBIGUITIES.

See EVIDENCE, 7; INSURANCE—FIRE, 10.

LEADING QUESTIONS.

See WITNESSES, 3, 4.

LEGACIES.

See EXECUTORS AND ADMINISTRATORS, 5-7, 12.

LEX LOCI CONTRACTUS.

See CONFLICT OF LAWS, 1.

LICENSES.

See CONSTITUTIONAL LAW, 2; GROWING TIMBER; INJUNCTIONS, 10.

LIENS.

See BANKRUPTCY AND INSOLVENCY, 1; FACTORS, 4, 8; JUDGMENTS, 11; PARTNERSHIP, 9, 10; SHIPPING, 2, 3.

LIMITATIONS.

See STATUTE OF LIMITATIONS.

MANSLAUGHTER.

See CRIMINAL LAW, 10-12.

MARITIME JURISDICTION.

See JURISDICTION, 1.

MARRIAGE AND DIVORCE.

- 1. PREVIOUS CONTRACT TO MARRY EXISTING BETWEEN PLAINTIFF AND THIRD PERSON** is no defense to an action for breach of promise of marriage, nor is it admissible in mitigation of damages. *Roper v. Clay*, 314.
- 2. COUNT FOR BREACH OF PROMISE OF MARRIAGE IS NOT AFFECTED** by count for seduction joined with it, and the latter may be disregarded under a practice act allowing the plaintiff to join as many different causes of action as he may have against the defendant. *Id.*
- 3. OMISSION TO AVER DEFENDANT'S PROMISE TO MARRY**, in count for breach of promise of marriage, is cured by verdict, where there is an averment that "the plaintiff promised to marry the defendant at the special instance and request of the defendant," and a subsequent averment "that the defendant, not regarding his said promise and undertaking." *Id.*
- 4. ADMISSION OF EVIDENCE UNDER COUNT FOR SEDUCTION** in action for breach of promise of marriage is not ground for the arrest or reversal of the judgment, for this evidence could properly have been admitted under the count for the breach of promise in aggravation of damages. *Id.*

MARRIED WOMEN.

MARRIED WOMAN'S GIVING HER OWN NOTE FOR PRICE OF SUPPLIES bought by her for her husband's farm is not conclusive evidence that the in-

debtedness was incurred by her individually; the questions of her agency and her husband's liability are for the jury. *Gates v. Brower*, 530.

See DOWER; EASEMENTS, 3; TRUST DEEDS; WILLS, 2, 5.

MASTER AND SERVANT.

1. EVIDENCE OF WILLFUL TRESPASS BY SERVANT will not render the master liable as a trespasser, without express evidence that the latter authorized the act. *McCoy v. McKowen*, 264.
2. PERSON EMPLOYED TO CUT LOGS OFF OF CERTAIN PREMISES BELONGING TO HIS EMPLOYER, and who agrees to deliver them to his said employer at a certain place, is alone responsible for any damage caused by floating said logs down to said point of delivery, as the relation of master and servant does not exist between them. *Moore v. Sanborne*, 209.
3. EMPLOYER, WHEN RESPONSIBLE FOR ACT OF EMPLOYEE.—An injury must arise in course of the execution of some service, lawful in itself but negligently or unskillfully performed, in order to render the employer liable for the act of his employee; as for a wanton violation of law by a servant, although occupied about the business of his employer, the servant alone is liable. *Id.*

See INSURANCE—FIRE, 9; INSURANCE—MARINE; NEGLIGENCE, 5.

MAXIMS.

MAXIM APPLIED, NO ONE CAN MAKE ANOTHER HIS DEBTOR WITHOUT HIS CONSENT. *Moore v. Thomson*, 550.

See MISTAKE.

MEDICAL BOOKS.

See PLEADING AND PRACTICE, 12.

MISREPRESENTATIONS.

See INSURANCE—FIRE; SALES, 9, 10.

MISTAKE.

IGNORANCE OF LAW IS NO EXCUSE. *State v. McIntire*, 566.

See COSTS, 2, 3; CRIMINAL LAW, 5; EASEMENTS, 2; ELECTIONS, 1; EQUITY, 6; PLEADING AND PRACTICE, 13, 14; TRESPASS, 3; WILLS, 6.

MONEY HAD AND RECEIVED.

See ASSUMPSIT, 2.

MORTGAGES.

1. CHATTEL MORTGAGE ON STOCK OF GOODS IN MORTGAGOR'S STORE, which purports to reserve a right in the mortgagor to sell and deliver (except on credit) from time to time, and to replace the goods delivered with others, is void on its face for fraud towards other creditors. *Edgell v. Hart*, 532.
2. REFERENCE IN RELEASE OF MORTGAGE, TO INSTRUMENT ON RECORD affecting the land, is constructive notice of the contents of such instrument. *Howard Ins. Co. v. Halsey*, 478.

2. **MORTGAGEE IS NOT BOUND TO INQUIRE, BEFORE RELEASING PORTION of the land, whether any portion has been conveyed or incumbered since his lien attached; but will retain the right to have the land sold in the inverse order of alienation, unless, before giving the release, he had actual or constructive notice of such subsequent alienation or incumbrance. *Id.***

See **FIXTURES, 7; NEGOTIABLE INSTRUMENTS, 18; STATUTE OF LIMITATIONS; TRUST DEEDS; VENDOR AND VENDEE, 3, 4.**

MOTIONS.

See **CONTEMPT.**

MUNICIPAL CORPORATIONS.

See **CONSTITUTIONAL LAW, 8-17; EMINENT DOMAIN, 2, 3; HIGHWAYS, 2-4; INJUNCTIONS, 9-11; OFFICES AND OFFICERS; RAILROADS, 8.**

MURDER.

See **CRIMINAL LAW, 10-12, 14-16; EVIDENCE, 14.**

MUTUALITY.

See **CONTRACTS, 1; SPECIFIC PERFORMANCE, 3**

MUTUUM.

See **BAILMENTS, 3.**

NAMES.

See **EVIDENCE, 4.**

NAVIGABLE WATERS.

See **WATERCOURSES.**

NAVIGATION.

See **WATERCOURSES, 3, 5, 10-15.**

NECESSARY PARTIES.

See **PLEADING AND PRACTICE, 2, 3.**

NEGLIGENCE.

1. **ONE ERECTING BUILDING TO RENT MUST EMPLOY REASONABLE SKILL AND DILIGENCE in its erection, regard being had to the uses and purposes for which it is designed. *Godley v. Hagerty, 731.***
2. **OWNER OF BUILDING THAT HE HAS ERECTED NEGLIGENTLY and with insufficient and improper materials, and has rented, is liable in damages for injuries to one employed in the building resulting from its insufficient construction. *Id.***
3. **ONE ERECTING BUILDING EXPECTING TO RENT IT AS WAREHOUSE, and knowing that in such case a strong building would be needed, suitable for heavy storage, and knowing after its completion that there were defects in it which unfitted it for the designated purpose, who leases it for warehouse purposes, yet does not stipulate in his lease against its being used for heavy storage, is liable in damages to an employee of the lessee,**

- who, while attending to his proper business therein, is injured by the fall of the building. *Id.*
4. ONE INJURED BY FALL OF BUILDING NEGLIGENTLY CONSTRUCTED may show, in a suit for damages against the owner, that the owner knew that it would be necessary for the building to be of the strongest kind in order to be suitable for the purpose for which it was used at the time of the accident, and that he expected to lease it for this use. *Id.*
 5. EMPLOYEE OF RAILROAD COMPANY MAY RECOVER DAMAGES FROM CORPORATION for a personal injury received through defects in the machinery intrusted to him to use (here, through the bursting of the boiler of a locomotive on which he was employed as fireman), upon proof that the corporation had been notified of the weak or defective condition of the machinery, and had failed to repair or replace it. *Keegan v. Western R. R. Corp.*, 476.
 6. TERM "NEGLIGENCE" HAS DIFFERENT MEANINGS in relation to different causes of action. In some cases, it means a very slight absence of care and prudence; in others, the absence of reasonable care; and again, such want of care as makes gross negligence. *Baltimore & S. R. R. Co. v. Woodruff*, 72.
 7. DEGREE OF NEGLIGENCE REQUISITE TO RENDER RAILROAD COMPANY LIABLE in damages for fire occasioned by its locomotives to property on the line of the road is that which arises from a want of reasonable care and diligence, and not that arising from the absence of the slightest or least care or caution. *Id.*
 8. TERM "REASONABLE CARE AND DILIGENCE," as applied to fires on line of railroad caused by engines running on the same, means having engines, properly constructed, in good order, with suitable fixtures for preventing injuries by fire; the spark-catchers, such as are known to the company to have been used and approved of, and best calculated to prevent the emission of sparks, while allowing sufficient draft to create steam enough to propel the engine at proper speed; and such care and diligence in using the locomotive upon the road as would be exercised by skillful, prudent, and discreet persons having control of the engine, regarding their duty to the company, and having a proper desire to avoid injuring property along the road. *Id.*
- See BAILMENTS, 7; COMMON CARRIERS, 1, 2; GUARANTY, 4; HIGHWAYS; INSURANCE—FIRE, 9; JUDGMENTS, 5; MASTER AND SERVANT; PHYSICIANS; RAILROADS, 5, 6; SPECIFIC PERFORMANCE, 1, 2; WILLS, 2.

NEGOTIABLE INSTRUMENTS.

1. PARTY SIGNING HIS NAME TO BLANK BILL OR NOTE, either as drawer, maker, or indorser, and delivering it to another, thereby gives that person authority to fill it up in any manner he pleases, not inconsistent with the character of such paper, and is liable to a party taking it without notice. *Davis v. Lee*, 267.
2. PARTY WHO SIGNS BLANK PAPER MAKES HOLDER HIS AGENT, as the blank signature operates as a general letter of credit, which authorizes the party to whom it was intrusted to fill it up as he chose. *Id.*
3. WHERE LOSS OCCURS TO HOLDER OF BLANK PAPER without notice, the principle that where one of two innocent parties must suffer, he who has been the cause of the loss must bear it, applies. *Id.*

4. DISCREPANCY EXISTING BETWEEN AMOUNT STATED IN BODY OF CERTIFICATE OF DEPOSIT and that stated in the margin, or at the bottom, will be controlled by the amount stated in the body of the instrument. *Payne Clark*, 333.
5. WHERE CERTIFICATE OF DEPOSIT STATES AMOUNT IN BODY OF INSTRUMENT as "one thousand and fourteen dollars (in funds as below)," in the margin as \$1,014, but at the bottom as "currency \$404, cash \$1,010, [total] \$1,414," the amount stated in the body of the certificate controls the specification of funds at the bottom; and if the plaintiff declares upon the instrument as for one thousand four hundred and fourteen dollars, an instruction that he can not recover is correct, though the defendant acknowledges his indebtedness for one thousand and fourteen dollars. *Id.*
6. PROMISSORY NOTE IS PRIMA FACIE EVIDENCE OF GOOD CONSIDERATION, and imports such until the contrary is shown; hence, evidence that part of a claim in the settlement of which a note was given was illegal would be insufficient, as the credits allowed might have covered the illegal part. That part of the consideration which was illegal must be distinctly shown. *Adams v. Hackett*, 376.
7. PRESENTMENT OF NOTE TO MAKER OR DEMAND AT PROPER PLACE IS NOT EXCUSED, so as to charge the indorser, by the fact that the maker has absconded, leaving no visible property subject to attachment, although the indorser knew of such absconding. *Pierce v. Cate*, 176.
8. NOTICE TO INDORSER OF MAKER'S DEFAULT IS PREMATURE if given before the close of business hours on the last day of grace, although after bank hours, when no presentment to or demand upon the maker has been made, and the note is not payable by its terms or by usage at a bank, nor placed in a bank for collection; and this although the indorser knew that the maker had absconded. *Id.*
9. ONE WRITING HIS NAME ON BACK OF NOTE, WHETHER NEGOTIABLE OR NOT, to which he is not a party, and before delivery to the payee, is to be treated as a maker of the note in the absence of evidence of a contrary intention. *Lewis v. Harvey*, 286.
10. PARTY INDORSING NOTE BEFORE DELIVERY TO PAYEE, AND CHARGED AS MAKER, may show that he signed as indorser, not as maker, and that such was the understanding of the parties at the time. *Id.*
11. BURDEN OF PROOF IS UPON PARTY INDORSING NOTE BEFORE DELIVERY TO PAYEE, and charged as maker, to show that the parties making and accepting the paper regarded it only as paper indorsed by him. *Id.*
12. INDORSEMENT BY THIRD PARTY TO RENDER HIM LIABLE AS MAKER need not be made contemporaneously with the execution of the note; if made before the note was completed and put into circulation, it is sufficient. *Id.*
13. EVIDENCE THAT NOTE WAS PRESENTED FOR PAYMENT and was protested for non-payment is sufficient proof that payment was refused. *Burgess v. Vreeland*, 408.
14. PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONTENTS OF NOTICE OF PROTEST. *Id.*
15. EVIDENCE THAT NOTICE OF PROTEST WAS GIVEN without proof of the contents is *prima facie* evidence that the notice was in due form. *Id.*
16. NOTICE OF PROTEST NEED NOT STATE IN TERMS that the note was presented for payment, or that the holder looks to the indorser for payment. If these appear by implication, it will be sufficient. *Id.*

17. **NOTICE OF PROTEST BY MAIL** should be mailed in time to go by the mail of the day after dishonor that closes after the commencement of usual business hours in order to bind the indorser. *Id.*
18. **RELEASING INDORSER—SALE OF MORTGAGED PROPERTY.**—A. and B. indorsed three promissory notes, payable at different dates, upon condition that the maker should execute a mortgage to the payee, conditioned that the mortgaged property should be sold if said notes were not paid at maturity. The first note fell due, was protested, etc., but was replaced by a new note, with the consent of all concerned. After the original but before the new or any of the other notes fell due, the mortgaged property was sold, with the consent of the mortgagor and maker of the notes, but not of the indorsers, and the proceeds of the sale applied to the payment of the two notes first falling due, without protesting them, and suit was brought against the indorser upon the third note: *Held*, that the right to sell, which arose when the first note was not paid, ceased with the substitution of the new note, and that a sale before the maturity of said new note violated the contract between the parties, and discharged the indorser. *Mayhew v. Boyd*, 101.
19. **MAKER OF ACCOMMODATION NOTE CAN NOT SET UP WANT OF CONSIDERATION** as a defense against it in the hands of a third person, though it be there as collateral security merely. *Lord v. Ocean Bank*, 728.
20. **ACCOMMODATION PAPER IS LOAN OF MAKER'S CREDIT WITHOUT RESTRICTION** as to the manner of its use. *Id.*
21. **FACT THAT HOLDER HAS OTHER COLLATERAL SECURITIES FOR SAME DEBT** more than sufficient to cover it without the accommodation note, also pledged, but which have not been realized so as to extinguish the debt, is no defense for the accommodation maker against the pledgee of the note; but if the debt had been so extinguished, the pledgee could not recover. *Id.*
22. **LEGAL TITLE TO NOTE PAYABLE TO ORDER OF "C., GUARDIAN," ETC.,** is in C., and passes by his indorsement to a *bona fide* assignee for value without notice, the words "guardian," etc., being mere *descriptio personæ*. *Thornton v. Rankin*, 338.
23. **BILL DRAWN BY PARTY WHO SIGNS HIMSELF AS AGENT,** and requests the drawee to "charge same to your agency at N.," discloses upon its face sufficient facts to put a prudent man upon inquiry as to whether the drawer signed in a representative capacity, or intended to bind himself personally. *Davis v. Henderson*, 229.
24. **INDORSEE OUGHT IN ALL CASES, WHEN CONSISTENT WITH JUSTICE, BE CONFINED TO CONTRACT** as made and assented to by the principals thereto. This rule is relaxed only in favor of innocent holders, who have reason to believe from the language employed that no restrictions or limitations to the liabilities of the parties appearing to be bound was intended. But where it appears that with ordinary prudence the indorsee could have discovered what was intended by the contract, this limitation does not apply. *Id.*
25. **MONEY PAID ON JOINT PROMISSORY NOTE BY ONE MAKER CAN NOT BE DIFFERENTLY APPLIED** by an arrangement between the persons paying and the payee; the other promisors are discharged to the extent of such payment, and the one making the payment can not restore their liability by any arrangement with the payee. *Frost v. Martin*, 353.

- 26. POSSESSION OF PROMISSORY NOTE BY ONE OF TWO OR MORE CO-PROMISORS** does not raise the presumption as against his co-promisors that he paid the whole of it. *Heald v. Davis*, 147.
- 27. BURDEN OF PROOF IN ACTION ON BANK BILL SHOWN TO HAVE BEEN STOLEN** is not on the plaintiff to show that he obtained it fairly and under such circumstances as entitle him to maintain an action on it. The burden is on the defendant to show that plaintiff did not so receive it. *Wyer v. Dorchester and Milton Bank*, 138.
- 28. TOTAL FAILURE OF CONSIDERATION IS GOOD DEFENSE** to an action on a promissory note, and a partial failure will be an answer *pro tanto*, if the amount of such deduction is to be ascertained by mere computation. *Drew v. Fowle*, 880.
- See AGENCY, 1, 3; CONSTITUTIONAL LAW, 2; CRIMINAL LAW, 9; EXECUTORS AND ADMINISTRATORS, 2; MARRIED WOMEN; PLEADING AND PRACTICE, 7; SURETYSHIP, 1; USURY, 2.

NEW TRIAL.

See PLEADING AND PRACTICE, 29.

NOTES.

See NEGOTIABLE INSTRUMENTS.

NOTICE.

- 1. TO BIND DEFENDANT IN PERSONAL ACTION**, he must, unless he waive notice by appearance, be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend. *Thompson v. Steamboat J. D. Morton*, 658.
 - 2. NO PERSONAL NOTICE TO PARTY INTERESTED IS NECESSARY IN PROCEEDING IN REM**, the action of the court having relation merely to the thing or property. *Id.*
 - 3. NOTICE WILL NOT BE IMPUTED FROM MERE RECORDING** of the subsequent deed, or from the fact that the mortgagee's solicitor in another employment acquired the information. *Howard Ins. Co. v. Halsey*, 478.
- See AGENCY, 3, 7-10; COMMON CARRIERS, 5, 6; EXECUTORS AND ADMINISTRATORS, 11; GUARANTY; INSURANCE—FIRE, 37, 38; LANDLORD AND TENANT, 3; MORTGAGES, 2, 3; NEGOTIABLE INSTRUMENTS, 1, 3, 8, 14-17, 92, 93.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 3.

NUISANCES.

See INJUNCTIONS, 4, 5, 8.

ODD FELLOWS.

See CORPORATIONS, 2.

OFFICES AND OFFICERS.

- TOWN TREASURER AND COLLECTOR IS NOT EXCUSED FROM FAILURE TO PAY OVER MONEY COLLECTED** by him by its loss through theft without his fault. *Hancock v. Hazzard*, 171.
- See ATTACHMENT, 1, 2; CORPORATIONS, 1; ELECTIONS; INJUNCTIONS, 9, 10, 11; QUO WARRANTO.

OPINIONS OF WITNESSES.

See INSURANCE—FIRE, 36; WITNESSES, 2.

ORDERS.

See EXECUTORS AND ADMINISTRATORS, 8; JUDGMENTS, 2.

PARDONS.

See CRIMINAL LAW, 4-7.

PARENT AND CHILD.

CHILD IN VENTRE SA MERE CAN NOT TAKE UNDER DEED OF GIFT to the donor's grandchildren. *Depree v. Depree*, 590.

See POWERS; TRUST DEEDS; WILLS, 5.

PAROL EVIDENCE.

See EVIDENCE; NEGOTIABLE INSTRUMENTS, 14; RELEASE; STATUTES OF FRAUDS, 7; TRUSTS AND TRUSTEES, 5; WILLS, 8.

PARTIES.

See JUDGMENTS, 2; PLEADING AND PRACTICE, 2, 3, 15.

PARTNERSHIP.

1. ACTION AT LAW CAN NOT BE SUSTAINED BY PARTNERSHIP AGAINST ONE OF ITS MEMBERS for advances made to the latter by the firm. *Thompson v. Steamboat J. D. Morton*, 658.
2. SURVIVING PARTNER OF FIRM CAN NOT MAINTAIN PROCEEDING IN REM AGAINST VESSEL, of which the deceased partner was the owner, for materials and labor furnished by the firm, for these are advances by a co-partnership to a member of the firm, and a plea setting forth these facts will be good in bar of the action. *Id.*
3. SURVIVING PARTNER OF TWO DIFFERENT FIRMS MAY JOIN IN ONE ACTION counts for sums due him as the surviving partner of each of said firms, and a count for money due him in his individual capacity. *Adams v. Hackett*, 376.
4. SURVIVING PARTNER CAN NOT RECOVER UNLESS PARTNERSHIP FIRM COULD HAVE SUSTAINED ACTION in the life-time of the deceased partner. *Thompson v. Steamboat J. D. Morton*, 658.
5. WHERE REAL ESTATE IS USED FOR PARTNERSHIP PURPOSES, and paid for with partnership funds, it is unnecessary that there should be an agreement among the partners that the land should be partnership property. *Jarvis v. Brooks*, 359.
6. SUBSEQUENT ATTACHMENT BY CREDITORS OF PARTNERSHIP WHO HAVE ATTACHED PROPERTY OF FIRM takes precedence of a prior attachment by creditors of the individual members of the firm who have attached the same property. *Id.*
7. PARTNERSHIP CREDITORS, IN ORDER TO AVAIL THEMSELVES OF THEIR RIGHTS OF PRIORITY, in case of conflicting attachments with individual creditors, require nothing more than a valid execution properly levied. *Id.*

8. **INTEREST IN PARTNERSHIP ONLY PASSES TO PERSON COMING IN RIGHT OF PARTNER**, be the transfer effected by whatever mode, and such interest can not be tangible, can not be made available or be delivered but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts. *Baker's Appeal*, 752.
9. **RIGHT TO CONFINE PARTNER, OR THOSE CLAIMING UNDER HIM, TO INTEREST IN SURPLUS**, after payment of the partnership debts, is an equity resting, not in the creditors of the firm, but in the remaining partners alone, who may insist upon it or waive it at their pleasure, leaving the creditors to the personal responsibility of the partners who contracted the debts. The creditors have no lien on the partnership property, and must work out their preference through the medium of the partners whose interests remain undisposed of. *Id.*
10. **PARTNER'S ENGAGEMENT TO PAY PARTNERSHIP DEBTS IS BUT PERSONAL CONTRACT**, and creates no lien where it is entered into by him on a sale to him of his partner's interest; and such partner need not appropriate the partnership assets to the payment of partnership liabilities. *Id.*
11. **PARTNERS ARE NOT DEPRIVED OF RIGHT OF ASSIGNING PARTNERSHIP ASSETS** for the payment, without preference, of all the debts of the firm to whom the property belonged at the time of the assignment, by the Pennsylvania act of 1843 to prevent preference in assignments. *Id.*
12. **TRANSFER OF INTEREST BY PORTION OF PARTNERS TO OTHERS DOES NOT DISCHARGE ORIGINAL PARTNERS** nor impose upon the subsequent firm any new liabilities to the creditors of the first. *Id.*

See CO-TENANCY, 1.

PATENT AMBIGUITIES.

See EVIDENCE, 5, 6.

PAYMENTS.

See ATTACHMENTS, 7; CONFLICT OF LAWS, 1; CONTRACTS, 10; FACTORS, 6, 7; INFANCY, 3; NEGOTIABLE INSTRUMENTS, 25, 26; PLEADING AND PRACTICE, 6, 7.

PENAL DAMAGES,

See TRESPASS, 2.

PERFORMANCE.

See COMMON CARRIERS, 1, 7; CONTRACTS, 2-5; EXECUTORS AND ADMINISTRATORS, 3; SPECIFIC PERFORMANCE; VENDOR AND VENDEE, 3.

PHYSICIANS.

1. **PHYSICIAN OR SURGEON, WITHOUT SPECIAL CONTRACT FOR PURPOSE**, never stipulates for the successful conclusion of his services, nor is he ever a warrantor or insurer. *Leighton v. Sargent*, 388.
2. **PHYSICIAN'S OR SURGEON'S IMPLIED CONTRACT WITH HIS EMPLOYER** is, that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by the professors of the same art or science; that he will use reasonable and ordinary care and diligence in the exertion of his skill and the application of his knowledge; that he

will use his best judgment as to the treatment of the case intrusted to his charge. *Id.*

3. PHYSICIAN OR SURGEON SHOULD BE CHARGED WITH CONSEQUENCES OF ERRORS only where such errors could not have arisen except from want of reasonable skill or diligence. *Id.*
4. PHYSICIAN IS NOT RESPONSIBLE FOR ERRORS OF JUDGMENT as to the proper treatment to apply in a particular case. *Id.*
5. EVIDENCE THAT PERSON ACCUSED OF NEGLIGENCE AND UNSKILLFULNESS in the treatment of a broken ankle was educated at a medical school of high repute, was a regularly educated and skillful physician and surgeon, is proper and should be admitted. *Id.*

PLEADING AND PRACTICE.

1. COURT WILL ALWAYS PREVENT CIRCUITY OF ACTIONS whenever it can be done and the rights of the parties be substantially preserved. *Carr v. Olough, 345.*
2. ALL PERSONS INTERESTED IN SUBJECT-MATTER OF SUIT MUST BE MADE PARTIES. *May v. Smith, 594.*
3. ASSIGNOR OF BOND MUST BE MADE PARTY IN ACTION AGAINST ASSIGNEE calling him to account for it by one claiming to be entitled to the bond. In such a case it is not a sufficient answer that the assignor is dead and that there is no personal representative, as it is the duty of the party seeking relief to procure a representative, and it is therefore no answer for the plaintiff that he is the representative. *Id.*
4. COMMON OPINION AMONG EMINENT JURISTS may be appealed to as evidence of what the law was considered to be, on a point to which there are no cases to the contrary. *Armstrong v. Risteau, 115.*
5. ACTION IS NOT ABATED BY SUBSEQUENT COMMENCEMENT and prosecution to judgment in the courts of a foreign nation of another action based on the same cause. *Wood v. Gamble, 135.*
6. PLEA IN ABATEMENT WILL BE ALLOWED upon suit brought before a justice, where the payee of a bond indorsed thereon a payment for the purpose of bringing the amount within a justice's jurisdiction. *Moore v. Thomson, 550.*
7. WHEN ALLEGATION IN BILL CLAIMED THAT CHECK WAS PAID, and then detailed the manner and circumstances of its payment, and the latter do not show facts constituting a valid payment, a demurrer to the bill should be sustained. *Redmond v. Dickerson, 418.*
8. WHERE EVERY ALLEGATION OF FRAUD CHARGED IN BILL IS MET AND DENIED by answer, and no effort is made by the party charging the fraud to sustain it, the other party is entitled to the full benefit of the answer so far as the same is responsive to the bill. *Allen v. Cole, 416.*
9. WHATEVER IS NOT SAID IN AFFIDAVIT OF DEFENSE IS TAKEN NOT TO EXIST. *Lord v. Ocean Bank, 728.*
10. WHERE COURT HAS NO AUTHORITY TO TAKE COGNIZANCE of the subject-matter of the suit, the proceedings may be dismissed at any stage of the case when that fact is made to appear; but to take advantage of a personal exemption, the objection should be interposed before pleading to the merits. *Thompson v. Steamboat J. D. Morton, 658.*
11. PLAINTIFF'S EVIDENCE IN REPLY MAY BE RECEIVED OR NOT, in the discretion of the presiding judge. *Ashworth v. Kittridge, 178.*

12. **MEDICAL BOOKS CAN NOT BE READ TO JURY** against the objection of the other side, even if it be said that only such works of good and established authority should be read. *Id.*
13. **COURT OF RECORD MAY CORRECT MISTAKES IN ITS RECORDS**, which do not arise from the judicial action of the court, but from the mistakes of its recording officer; and this it may do, either on suggestion or motion of those interested, or upon its own certain knowledge and mere motion. *Lewis v. Ross*, 49.
14. **AFTER EXPIRATION OF TERM, COURT MAY AMEND CLERICAL ERRORS**; but anything which enters into the consideration of the court and constitutes part of the judgment can not be changed after the term. *Whitwell v. Emory*, 220.
15. **WHERE COURT HAS POWER TO AMEND**, all the parties to be affected by such amendment should be cited before the court. *Id.*
16. **INSTRUCTION UNSUPPORTED BY EVIDENCE**, properly appearing in the trial, should be rejected. *Marshall v. Haney*, 92.
17. **INSTRUCTION IS ERRONEOUS WHEN ITS EFFECT IS TO TAKE CASE FROM JURY**, as where the instruction is simply that there is no evidence to a certain point, this point only impliedly affecting the point in controversy, and there being other evidence from which a verdict might have been rendered for the defeated party. *Tibeau v. Tibeau*, 329.
18. **VERDICT MAY BE DIRECTED INDEPENDENT OF CONSENT OF PARTIES**, whenever the party on whom the burden of proof lies wholly fails to sustain it by evidence. *People v. Cook*, 451.
19. **ADMISSION OF EVIDENCE ON COUNT NOT GOOD IN LAW** is not ground for arrest or reversal of the judgment, when the evidence might have been given under another good count of the declaration. *Roper v. Clay*, 314.
20. **REFUSAL TO CHARGE UPON POINT IS NO GROUND FOR REVERSAL** when no injury was thereby done to the party making the request. *Chase v. Washburn*, 623.
21. **INSTRUCTION ASSUMING THAT PROPERTY WAS DAMAGED** in the manner complained of is defective, notwithstanding the proof established the fact beyond a reasonable doubt. *Baltimore & S. R. R. Co. v. Woodruff*, 72.
22. **INSTRUCTION THAT THERE IS NO EVIDENCE THAT WILL WARRANT JURY IN FINDING FOR PLAINTIFF** is erroneous when the plaintiff has introduced any evidence conducing to support his cause of action. *Houghtaling v. Ball*, 331.
23. **REVERSAL MAY BE HAD FOR INSTRUCTIONS CORRECT IN ABSTRACT**, but not adapted to the case stated in the pleadings, such instructions being given to the jury in response to an inquiry made by them, and after the case had been tried on the theory stated in the complaint. *Lund v. Tyngsborough*, 159.
24. **EXCEPTIONS WILL NOT BE CONSIDERED UNLESS SET OUT IN PAPER-BOOK** as the rule of court requires. *Reimer v. Stuber*, 744.
25. **GENERAL EXCEPTION TO CHARGE WHICH CONTAINS TWO PROPOSITIONS**, one of which is clearly right, will not be available, even though the other proposition be erroneous. *Hart v. R. & S. R. R. Co.*, 447.
26. **BILL OF EXCEPTIONS SEALED BUT UNSIGNED** by the court is not defective when it is followed by a second bill regularly signed and sealed, and referring to the subject-matter contained in the unsigned bill. *Baltimore & S. R. R. Co. v. Woodruff*, 72.

27. JUDGMENT IS ANNULLED BY APPEAL TO SUPREME COURT. *State v. McIntire*, 566.
28. APPEAL FROM FINAL DECREE OPENS UP WHOLE MERITS OF CAUSE touching the subject-matter of the decree. *Teaff v. Hewitt*, 634.
29. APPELLATE COURT WILL NOT DISTURB VERDICT ON GROUND OF INSUFFICIENCY OF EVIDENCE, when there is evidence tending to support it. *Roper v. Olay*, 314.
30. GENERAL PRINCIPLE OF AIDING DEFECTS IN PLEADING BY INTENDMENT AFTER VERDICT is, that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required proof on the trial of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict. *Id.*
31. DEFENDANT CAN NOT APPEAL FROM JUDGMENT IN HIS FAVOR because instructions asked by him were not given, as he was not aggrieved by the result of the trial below. *Ringgold v. Barley*, 106.
32. WHEN APPEAL IS TAKEN UPON DEMURRER, the averment in the bill will be taken as true. *Maddox v. White*, 67.
- See ADVERSE POSSESSION, 7; ATTACHMENTS, 6, 7; CONTEMPT; COSTS; CRIMINAL LAW, 12; DECEIT, 1; ELECTIONS; EQUITY; EVIDENCE, 2, 3, 10; EXECUTORS AND ADMINISTRATORS, 12; FRAUD, 1; HIGHWAYS, 4; INSURANCE—FIRE, 12, 13, 18; JUDGMENTS, 8-10; MARRIAGE AND DIVORCE; NEGLIGENCE, 4; NEGOTIABLE INSTRUMENTS, 5; NOTICE; PARTNERSHIP, 3; QUO WARRANTO; RAILROADS, 8.

PLEDGES.

See FACTORS, 8.

POSSESSION.

See ADVERSE POSSESSION; NEGOTIABLE INSTRUMENTS, 26; STATUTE OF FRAUDS, 3; VENDOR AND VENDEE, 1, 2.

POWERS.

GENERAL POWER TO SELL LEASE, ETC., GIVEN TO STRANGER IN DEED to grantor's children is void, and a sale under such a power is of no effect. *Doe ex dem. Smith v. Smith*, 581.

See DEEDS, 5.

POWERS OF ATTORNEY.

See AGENCY, 2.

PRACTICE.

See PLEADING AND PRACTICE.

PRECATORY TRUSTS.

See TRUSTS, 1-3.

PREFERENCES.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; PARTNERSHIP, 9, 11.

PRESCRIPTION.

See ADVERSE POSSESSION; EASEMENTS, 2; STATUTE OF LIMITATIONS.

PRESENTMENT.

See NEGOTIABLE INSTRUMENTS, 7, 8, 12.

PRESUMPTIONS.

See ADVERSE POSSESSION, 7; ATTORNEY AND CLIENT; BANKRUPTCY AND INSOLVENCY, 5; EASEMENTS, 2, 3; EVIDENCE, 1, 10; INSURANCE—FIRE, 11; NEGOTIABLE INSTRUMENTS, 26.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVILEGE OF WITNESSES.

See WITNESSES, 2.

PROBATE.

See WILLS, 10.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 12-15.

PUBLICATION.

See WILLS, 1.

PUBLIC IMPROVEMENTS.

See CONSTITUTIONAL LAW, 15-17; EMINENT DOMAIN; RAILROADS, 7.

PUBLIC LANDS.

See TRESPASS, 2.

PUBLIC USE.

See DOWER, 2.

QUASI CORPORATIONS.

See CORPORATIONS, 2-5.

QUESTIONS OF LAW AND FACT.

See ADVERSE POSSESSION, 7; INSURANCE—FIRE, 8, 10; MARRIED WOMEN; SALES, 3; STATUTE OF FRAUDS, 2.

QUO WARRANTO.

ACTION IN NATURE OF QUO WARRANTO, authorized by New York code of procedure to be brought for determining the title to a public office, being a civil, not a criminal, proceeding, is to be reviewed by appeal, not by writ of error. *People v. Cook*, 451.

See ELECTIONS, 1.

RAILROADS.

1. **MARYLAND RAILROAD ACT OF 1838 CONSTRUED.** *Baltimore & S. R. R. Co. v. Woodruff*, 72.
2. **INDEPENDENT RAILROAD COMPANIES OPERATING ROADS WHICH FORM CONNECTING ROUTE**, under an agreement which authorizes the agents of each to sell through tickets, are each so far liable for the performance of passage contracts that a passenger may sustain an action against the corporation of whose agent he bought his ticket for loss of baggage, on proof that it was not delivered to him at the end of the trip by the agents of the corporation whose road is the last on the connection. *Hart v. R. & S. R. R. Co.*, 447.
3. **RAILROAD COMPANY HAVING ONCE LOCATED THEIR ROAD**, under a charter that fixes merely a few points through which the road is to pass from its commencement to its terminus, leaving the location of the road between the points specified to the discretion of the corporation, has no right to change the location either upon the property of an individual or from one part of a street or highway to another. *Little Miami R. R. Co. v. Naylor*, 667.
4. **RAILROAD COMPANY IS LIABLE FOR DAMAGE CAUSED TO GROCERY AND DWELLING** by a relocation of their road upon a public street so that the track lay near the premises, thereby depreciating their value. *Id.*
5. **CARRIERS OF PASSENGERS ON RAILROADS ARE NOT INSURERS** of the lives and limbs of their passengers, but the implied contract binds them to exercise the highest degree of care and prudence, and makes them liable for the slightest neglect. *Peters v. Rylands*, 746.
6. **OWNER OF PASSENGER CARS ENGAGED IN CARRYING PASSENGERS OVER TRACK BELONGING TO STATE**, by which also the motive power is furnished, is liable for injuries to a passenger from a collision, though it were caused by the negligence of the engineer who is employed by the state; and if there be a common liability, that of the state can not be enforced by action, and this circumstance does not diminish that of the carrier. *Id.*
7. **RAILROADS ARE NOT PRIVATE AFFAIRS BUT PUBLIC IMPROVEMENTS**, and it is the right and duty of the state to advance the commerce and promote the welfare of the people by making or causing them to be made at the public expense. *Sharpless v. Mayor etc. of Philadelphia*, 759.
8. **COURT WILL NOT DETERMINE AMOUNT OF CITY'S INTEREST IN PROPOSED RAILROAD**, to the stock of which such city has been authorized to subscribe. Such matters are to be settled by her own officers and by the legislature; and it is enough for the court to know that the city may have a public interest in the railroad, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at first blush. *Id.*

See CORPORATIONS, 8-17; EMINENT DOMAIN, 2, 3; INJUNCTIONS, 9, 10; NEGLIGENCE, 5-7.

RATIFICATION.

See **FACTORS**, 7.

RECEIPTS.

See **RELEASE**.

RECEIVERS.

1. **APPOINTMENT OF RECEIVER IN SUPPLEMENTARY PROCEEDINGS**, when completed, vests title to the debtor's effects, real as well as personal, without formal assignment. *Porter v. Williams*, 519.
2. **RECEIVER APPOINTED IN SUPPLEMENTARY PROCEEDINGS** may, as representing the creditors, sue to set aside an assignment, etc., made by the debtor, notwithstanding it may be obligatory on the debtor. *Id.*

RECORDS.

See **ASSAULT AND BATTERY**, 1; **COSTS**, 2, 3; **EVIDENCE**, 4; **MORTGAGES**, 2; **NOTICE**, 3; **PLEADING AND PRACTICE**, 12.

REFORMATION OF INSTRUMENTS.

See **EVIDENCE**, 8.

RELEASE.

WRITTEN ACKNOWLEDGMENT OF MONEY AS RECEIVED "IN FULL" for a demand for unliquidated damages is not within the rule which allows a simple receipt to be contradicted by parol; but is treated as a release, and, unless obtained by fraud, etc., bars any further claim. *Coca v. Knap*, 502.

See **MORTGAGES**, 2, 3.

RELIGIOUS SOCIETIES.

See **CORPORATIONS**, 3-5.

REMAINDERS.

See **EXECUTORS AND ADMINISTRATORS**, 6.

REMEDIES.

See **CONSTITUTIONAL LAW**, 4; **EQUITY**; **FRAUDULENT CONVEYANCES**; **STATUTES**, 1.

REPEAL.

See **CONSTITUTIONAL LAW**, 2.

REPLEVIN.

See **INFANCY**, 3; **SHIPPING**, 3.

REPRESENTATIONS.

See **INSURANCE—FIRE**; **SALES**, 9, 10.

RESCISSION OF CONTRACTS.

See **CONTRACTS**, 3, 4, 8-11; **EQUITY**, 4, 5; **INFANCY**; **SALES**, 12.
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RES GESTÆ

See EVIDENCE, 9.

RESIDENCE.

See DOMICILE.

RESULTING TRUSTS.

See TRUSTS AND TRUSTEES, 5-7.

RETROSPECTIVE LAWS.

See CONSTITUTIONAL LAW, 2, 4.

RETURN.

See ELECTIONS, 1.

REVERSAL.

See CRIMINAL LAW, 12; JUDGMENTS, 6, 9, 10; MARRIAGE AND DIVORCE, 4; PLEADING AND PRACTICE, 19, 20, 23; USURY, 1.

REVOCATION.

See AGENCY, 2; GIFTS, 1, 3; SUBSCRIPTION, 1; WILLS, 6-8.

RIVERS.

See WATERCOURSES.

SALES.

1. ONE PURCHASING GOODS ON CREDIT KNOWING HIS INSOLVENCY AND INABILITY TO PAY is not guilty of such fraud as will avoid the sale if he purchased without the preconceived design of not paying for them. *Bidart v. Wales*, 327.
2. VENDER PURCHASING GOODS WITH PRECONCEIVED DESIGN OF NOT PAYING FOR THEM obtains no property in the goods. *Id.*
3. QUESTION OF FRAUDULENCY OF SALE OF GOODS IS FOR JURY. *Id.*
4. PRECONCEIVED DESIGN OF NOT PAYING FOR GOODS PURCHASED MAY BE EVIDENCED by a resale of them at a sacrifice, an assignment in insolvency or to a favored creditor, or absconding with the goods, or other circumstances. *Id.*
5. WHERE OWNER OF LARGE QUANTITY OF CORN IN BULK SELLS TO ANOTHER a certain number of bushels of it, and the vendee pays for the whole of what he buys and takes away a part thereof, leaving the rest for his convenience, without charge for storage, in the vendor's store, the property in the whole of the corn sold passes to the vendee, and is at his risk. *Waldron v. Chase*, 56.
6. SALE ON CONDITION THAT VENDER MAY RETURN CHATTEL IN SPECIFIED TIME BECOMES ABSOLUTE, and the obligation to pay the price becomes unconditional, if during that time the vendee disables himself from performing the condition by substantially injuring the chattel. *Ray v. Thompson*, 187.
7. WHERE PERSONAL PROPERTY IS SOLD TO BE PAID FOR WHEN DELIVERED, and a part only is delivered under the contract, the property in the part not delivered still remains in the vendor. *Lewis v. Ross*, 49.

8. PURCHASER TAKES RISK OF QUALITY OF ARTICLES PURCHASED, unless it be warranted or he be fraudulently misled as to it. *Wetherell v. Neilson*, 741.
 9. MERE REPRESENTATIONS AS TO QUALITY OF GOODS SOLD do not constitute a warranty. *Id.*
 10. EVIDENCE OF SPECIAL CUSTOM AMONG CERTAIN TRADERS, making common words of representation words of warranty, is not admissible. *Id.*
 11. IN ACTION ON WARRANTY OF SOUNDNESS OF HORSE, TESTIMONY AS TO SOUNDNESS OF HORSE by witnesses who saw the horse about the time of the sale, and especially while in the possession of the purchaser, is competent to go to the jury upon that question. *Kuntzman v. Weaver*, 740.
 12. UPON BREACH OF WARRANTY OF SOUNDNESS OF HORSE, purchaser may return horse and recover price paid, with interest from the time of the return. *Id.*
- See AGENCY, 4, 5; BAILMENTS, 1, 3, 4; CONFLICT OF LAWS, 1; CORPORATIONS, 1; DECKIT; EXECUTORS AND ADMINISTRATORS, 8; FACTORS; GROWING TIMBER; GUARANTY, 5; INFANCY; INSURANCE—FIRE, 25, 27, 28, 31; STATUTE OF FRAUDS.

SALVAGE.

See SHIPPING, 2, 3.

SCIENTER.

See DECEIT, 1.

SECONDARY EVIDENCE.

See EVIDENCE, 12.

SEDUCTION.

SEDUCTION AND IMPREGNATION CONSTITUTE NO CAUSE OF ACTION against the seducer in behalf of the party seduced. *Roper v. Clay*, 314.

See MARRIAGE AND DIVORCE, 2, 4.

SENTENCE.

See CRIMINAL LAW, 13.

SERVANTS.

See MASTER AND SERVANT.

SERVICE.

See INJUNCTIONS, 11.

SERVICES.

See BAILMENTS, 1, 7.

SERVITUDES.

See EASEMENTS, 10.

SET-OFF.

1. DAMAGES FOR BREACH OF COVENANTS IN DEED MAY BE SET OFF in an action of *assumpsit* for the consideration, where the amount of such damages is to be ascertained by mere calculation. *Drew v. Towle*, 330.

2. **SET-OFF.**—A claim for uncertain or unliquidated damages can never be used as a set-off. *Id.*

See **EXECUTORS AND ADMINISTRATORS**, 12.

SHERIFFS.

See **EXECUTIONS**, 1.

SHERIFF'S SALE.

See **EXECUTIONS**.

SHERIFF'S DEED.

See **EXECUTIONS**.

SHIPPING.

1. **CARGO OF SUNKEN OR ABANDONED VESSEL IS NOT "WRECKED PROPERTY,"** and the provisions of 1 N. Y. R. S. 690, sec. 1, regulating keeping of wrecked property for its owner, do not apply to it. *Baker v. Hoag*, 431.
 2. **SUNKEN VESSEL OR CARGO IS SUBJECT OF SALVAGE**, and the salvor has a lien upon it for compensation, provided the place where the rescue of it is effected is within admiralty and maritime jurisdiction. *Id.*
 3. **LIEN GIVEN BY MARITIME LAW, FOR SALVAGE, MAY BE RECOGNIZED** and protected by a common-law court, in replevin by the owner of the res against the salvor, without proof of a request or promise to pay. *Id.*
- See **COMMON CARRIERS**, 7; **CONSTITUTIONAL LAW**, 3; **INSURANCE—MARINE**; **PARTNERSHIP**, 2; **STATUTES**, 1.

SHORE.

See **WATERCOURSES**, 2, 3, 5, 7.

SOVEREIGNTY.

See **FRANCHISES**; **TAXATION**; **WATERCOURSES**.

SPECIFIC PERFORMANCE.

1. **SPECIFIC PERFORMANCE WILL NOT BE GRANTED** when the party applying has omitted to execute his part of the contract at the appointed time though not notified to do so, without being able to assign any sufficient justification or excuse for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay. *Kirby v. Harrison*, 677.
2. **SPECIFIC PERFORMANCE WILL NOT BE DECREED TO ASSIST PARTY WHO HAS DELAYED** payment in order to see whether the contract would prove a gaining or a losing bargain. *Id.*
3. **CONTRACT MUST BE MUTUAL TO ENTITLE PARTY TO DECREE FOR SPECIFIC PERFORMANCE.** Both parties must, by the agreement, have a right to compel specific performance. *Bodine v. Glading*, 749.
4. **SPECIFIC PERFORMANCE WILL NOT BE DECREED** where the parties themselves have agreed upon the damages for the breach of the contract, or have provided the means by which such damages may be ascertained. *Id.*

See **CONTRACTS**, 8.

SPLITTING DEMAND.

See PLEADING AND PRACTICE, 6.

STATUTE OF FRAUDS.

1. **DELIVERY OF ARTICLE SOLD TAKES CONTRACT OUT OF STATUTE OF FRAUDS.**
Houghtaling v. Ball, 331.
2. **EXISTENCE OF DELIVERY OF GOODS SUFFICIENT TO TAKE SALE OUT OF STATUTE OF FRAUDS** is a question of fact for the jury, under the direction of the court. *Id.*
3. **DELIVERY—STATUTE OF FRAUDS—GROWING TREES.**—Where one person by a written contract sold to another trees growing upon the former's land, and the latter, after removing certain of the trees, resold the remainder to the owner of the land by a parol contract, the sale, under the seventeenth section of the statute of frauds, is a contract for the sale of goods, and the purchaser under said parol contract being in possession of the land upon which the trees were growing, the sale *eo instanti*, by force of law, gave possession of the trees to the defendant, and the delivery was perfect. *Smith v. Bryan*, 103.
4. **AGREEMENT VOID IN PART UNDER STATUTE OF FRAUDS** is not necessarily void *in toto*. *Rand v. Mather*, 131.
5. **PROMISE TO CONTRACTOR BY STRANGER TO CONTRACT** that if the former will proceed to complete certain work the latter will pay him for the whole, is void as to the work done before such promise was made, but valid with respect to the work done afterwards. *Id.*
6. **BURDEN OF PROVING STATUTE OF FRAUDS OF SISTER STATE** is upon party relying thereon. *Houghtaling v. Ball*, 331.
7. **STATUTE OF FRAUDS** applies where a purchase is made by one in his own name and upon his own credit, and it can not be proved by parol that the purchase was for another's benefit. *Hollida v. Shoop*, 88.

STATUTE OF LIMITATIONS.

RULE THAT WHATEVER DISCHARGES DEBT NECESSARILY DISCHARGES DEED IN TRUST, on property executed to secure it, does not apply where an action upon the debt has been barred by the statute of limitations. In such a case, the creditor may proceed to foreclose the mortgage, notwithstanding the bar of the debt by the statute of limitations. *Bush v. Cooper*, 270.

See ADVERSE POSSESSION; CO-TENANCY, 3; EASEMENTS, 2-4.

STATUTES.

1. **OHIO WATER-CRAFT LAW AUTHORIZING PROCEEDINGS IN REM AGAINST VESSELS** is merely a cumulative remedy given by statute for the recovery of a claim against the owner himself, and was designed to avoid the difficulty which often exists of ascertaining and proceeding against the owner or owners in person. *Thompson v. Steamboat J. D. Morton*, 658.
 2. **LEGISLATURE CAN NOT SUBMIT LAW TO PEOPLE** in such manner as to make its final enactment depend on the popular vote, unless when specially authorized by the constitution. *Barto v. Himrod*, 506.
- See ADVERSE POSSESSION, 2; CONSTITUTIONAL LAW; CONTRACTS, 6; EXECUTORS AND ADMINISTRATORS, 8; JURISDICTION, 2, 3; RAILROADS, 1; SHIPPING, 1.

STOCK.

See CONSTITUTIONAL LAW, 8-14, 17.

STREETS.

See HIGHWAYS.

SUBROGATION.

See INSURANCE—FIRE, 31.

SUBSCRIPTION.

1. ENGAGEMENT TO SUBSCRIBE FOR BENEFIT OF ASSOCIATION IS NECESSARILY MERE PROPOSAL, and therefore revocable until the association is formed; until then there is no one to accept the proposal, and it is withdrawn by the death of a subscriber before its acceptance. *Phipps v. Jones*, 708.
 2. ASSOCIATION HAVING BEEN FORMED, AND HAVING CONTRACTED FOR LOT OR BUILDING in the life-time of a subscriber, and with his express or implied consent, upon the faith of a subscription made to it before its formation, may recover upon the subscription either from him or his representatives. *Id.*
- See CONSTITUTIONAL LAW, 8-14, 17; EMINENT DOMAIN, 2, 3; RAILROADS, 8.

SUPERIOR COURTS.

See INJUNCTIONS, 9.

SUPREME COURT.

See ELECTIONS, 1.

SURETYSHIP.

1. SURETIES OR INDORSERS AGAINST WHOM JUDGMENT HAS BEEN RENDERED, and who have obtained title to property under a judgment rendered against them in an action of trespass brought by one upon whose goods they levied by mistake as upon the property of the principal, and who have sold this property and applied it to the satisfaction of the judgment against them, may enforce contribution from co-sureties in a proportionate amount of the sum applied to the satisfaction of the judgment against them. *Acheson v. Miller*, 663.
 2. ACTION AT LAW FOR CONTRIBUTION FROM CO-SURETY CAN ONLY BE SUSTAINED where a just and equitable ground exists therefor, since the right is founded, not in the contract of suretyship, but is the result of a general principle of equity which equalizes burdens and benefits, and the common law has adopted and given effect to this equitable principle. *Russell v. Faylor*, 631.
 3. CONTRACT OF SURETYSHIP IS ACCESSORY TO OBLIGATION CONTRACTED BY ANOTHER, and it is of the essence of the contract that there be a subsisting valid obligation of a principal debtor. *Id.*
 4. CONTRIBUTION AGAINST CO-SURETY CAN NOT BE CLAIMED by a surety who voluntarily pays money on a void note. *Id.*
 5. ANY DEALINGS BY CREDITOR WITH PRINCIPAL DEBTOR which amounts to a variation from the contract by which the surety is to be bound, and which by possibility might vary or enlarge the latter's liability without his consent, operates as a discharge of such surety. *Mayhew v. Boyd*, 101.
- See GUARANTY.

SURGEONS.

See PHYSICIANS.

SURVIVORSHIP.

See PARTNERSHIP, 2-4

TAXATION.

1. **TAXATION IS LEGISLATIVE RIGHT AND DUTY**, which must be exercised by the legislature, or under the authority of laws passed by them. *Sharpless v. Mayor etc. of Philadelphia*, 759.
2. **POWER OF LEGISLATURE WITH REFERENCE TO TAXATION IS LIMITED** only by their own discretion. For the abuse of it, members are accountable to nobody but their constituents. *Id.*
3. **TAXATION MEANS CERTAIN MODE OF RAISING REVENUE FOR PUBLIC PURPOSE** in which the community that pays it has an interest. The right of the state to lay taxes has no greater extent than this. *Id.*
4. **ACT OF LEGISLATURE WOULD NOT BE LAW** when it authorizes contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest. The act would be but a sentence commanding the periodical payment of a certain sum by one portion or class of people. The power to make such order is not legislative but judicial, and was not given to the legislature by the general grant of legislative authority. *Id.*
5. **TAX LAW IS NOT UNCONSTITUTIONAL ON GROUND** that the act authorizes contributions to be levied for a public purpose in which those from whom they are exacted have no interest, unless it is apparent at first blush that the community taxed can have no possible interest in the purpose to which their money is to be applied. And this is more especially true if it be a local tax, and if the authorities have themselves laid the tax in pursuance of an act of the legislature. *Id.*
6. **RIGHT OF LEGISLATURE TO TAX PARTICULAR CITY FOR LOCAL IMPROVEMENT**, with the consent of the local authorities, is as clear as the right to lay a general tax for any purpose whatever. *Id.*

See CONSTITUTIONAL LAW, 11-13.

TENANTS.

See LANDLORD AND TENANT.

TENANTS FROM YEAR TO YEAR.

See LANDLORD AND TENANT, 2.

TENANTS IN COMMON.

See CO-TENANCY.

TENDER.

See CONTRACTS, 10, 11; TRUSTS AND TRUSTEES, 7.

TIDE-LANDS.

See WATERCOURSES, 2, 3, 5, 7.

TIME.

See CONTRACTS, 2-5.

TITLE.

See ADVERSE POSSESSION; AGENCY, 9, 10; EQUITY, 3, 7; EXECUTIONS, 1; FACTORS, 1-4, 7; INJUNCTIONS, 3, 4; JUDGMENTS, 7; LANDLORD AND TENANT, 1; NEGOTIABLE INSTRUMENTS, 22; RECEIVERS, 1; SALES, 2, 5, 7; SURETYSHIP; TRESPASS, 6, 9; VENDOR AND VENDEE, 1; WATERCOURSES, 2, 5.

TOLLS.

See CONSTITUTIONAL LAW, 17.

TREASURERS.

See CORPORATIONS, 1, 2; OFFICES AND OFFICERS.

TRESPASS.

1. AUTHORITY TO COMMIT TRESPASS CAN NOT BE IMPLIED. *McCoy v. McKown*, 264.
 2. PARTY INTENDING TO COMMIT TRESPASS ON PUBLIC LANDS, and by mistake committing trespass upon lands of private individual, is liable for such trespass in penal damages. *Perkins v. Hackleman*, 243.
 3. PARTY SUPPOSING HIMSELF TO BE CUTTING TIMBER ON HIS OWN LAND, but by mistake cutting on another's land, is liable for the actual damage done. *Id.*
 4. DAMAGES FOR SEPARATE TRESPASS OF ONE OF TWO DEFENDANTS can not be included in a joint judgment against both. *Symonds v. Hall*, 53.
 5. IT IS RIGHT AND DUTY OF JURY, IN ASSESSING DAMAGES in an action of trespass for an assault, to consider what effect the finding of trivial damages would have to encourage a disregard of the laws and disturbances of the public peace, and it is not error for the court to so instruct them. *Beach v. Hancock*, 373.
 6. ONE ELECTING TO PROCEED IN TRESPASS OR TROVER FOR TAKING OR CONVERSION of personal property abandons his property to the wrong-doer at that time and proceeds for its value; so that when judgment is obtained and satisfaction made, the property is vested in the defendant by relation as of the time of the taking or conversion. *Acheson v. Miller*, 663.
 7. RULE THAT NO CONTRIBUTION LIES BETWEEN TRESPASSERS applies only to cases where the persons have engaged together in doing wantonly or knowingly a wrong. *Id.*
 8. CONTRIBUTION LIES BETWEEN TRESPASSERS, where one of several persons who join in performing an act which to them appears to be right and lawful, but which proves to be a tort, has paid the amount of the damage. *Id.*
 9. TITLE OF GOODS IS TRANSFERRED TO DEFENDANT UPON RECOVERY IN TRESPASS OR TROVER by the plaintiff of the value of the specific chattels of which the possession has been acquired by tort. *Id.*
- See EXECUTIONS, 1; INJUNCTIONS, 3; MASTER AND SERVANT, 1; SURETYSHIP, 1.

TROVER.

DEMAND AND REFUSAL ARE ONLY EVIDENCE OF CONVERSION; they do not constitute a conversion if the party has not the power of compliance. *Carr v. O'ough*, 345.

See **FACTORS**, 8; **INFANCY**, 3-5; **TRESPASS**, 6, 9.

TRUST DEEDS.

1. **TRUST DEED MADE BY WOMAN INTENDING MARRIAGE, SETTLING HER LANDS** so as to provide for her support during life, and for the education, maintenance, etc., of any children of the intended marriage, or if none, then with remainder to other persons named, vests an equitable interest in the children when born, which can not be divested by a subsequent conveyance made by the mother (the grantor in the trust deed) and the trustee. *Wright v. Miller*, 438.
2. **CONVEYANCE BY GRANTOR IN TRUST DEED, AND TRUSTEE**, of lands settled in trust, is a fraud on the beneficiaries in remainder named in the trust; and equity will entertain a suit in their behalf to cancel it, notwithstanding that they were unborn when the trust was created; that the time has not yet arrived when they are to enter on the enjoyment of the remainder; and that the conveyance was made under authority of a decree of court (fraudulently obtained). *Id.*

See **STATUTE OF LIMITATIONS**.

TRUSTEE PROCESS.

See **ATTACHMENTS; COSTS**.

TRUSTS AND TRUSTEES.

1. **WORDS IN WILL EXPRESSIVE OF DESIRE, RECOMMENDATION, AND CONFIDENCE** are not words of technical but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust, and the old Roman and English rule on this subject is not part of the common law of Pennsylvania. *Pennock's Estate*, 718.
2. **WORDS OF DESIRE, RECOMMENDATION, AND CONFIDENCE IN WILL MAY AMOUNT TO DECLARATION OF TRUST**, when it appears from other parts of the will that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice, or discretion. *Id.*
3. **MERE WORDS OF DESIRE, RECOMMENDATION, AND CONFIDENCE IN WILL CREATE NO TRUST**. The testator willed to his wife his real estate "during her natural life," and his "personal estate of every description * * * absolutely, having full confidence that she will leave the surplus to be divided at her decease justly among my children." By this will the absolute ownership of the personal property of the testator is given to his widow, with an expression of mere expectation that she will use and dispose of it discreetly as a mother, and no trust is thereby created. *Id.*
4. **INTENT OF SETTLER IN CREATION OF TRUST MUST BE CARRIED INTO EFFECT** unless it contravenes some public policy of the law. *Wright v. Miller*, 438.
5. **TO ESTABLISH RESULTING TRUST BY PAROL**, there must be the clearest and most indisputable proof that the purchase was made for the party claiming such trust, and the purchase money paid by him. *Hollida v. Shoop*, 88.

6. **SUBSEQUENT ADVANCES WILL NOT ATTACH BY RELATION** a resulting trust to the original purchase. *Id.*

7. **AFTER PURCHASE WITH PARTY'S OWN MONEY OR CREDIT**, a subsequent tender or reimbursement by another may be evidence of some other contract, or the ground of some other relief, but can not by retrospective effect produce a resulting trust. *Id.*

See **BANKRUPTCY AND INSOLVENCY**, 4, 5; **CHARITABLE USES**; **TRUST DEEDS**, **WILLS**, 5.

UNINCORPORATED SOCIETIES.

See **CORPORATIONS**, 2-5; **SUBSCRIPTION**.

USAGES.

See **FACTORS**, 3; **INSURANCE—FIRE**, 1, 10, 11, 35; **SALES**, 10; **WATERCOURSES**, 11, 12.

USE AND OCCUPATION.

See **LANDLORD AND TENANT**, 3.

USES.

See **CHARITABLE USES**.

USURY.

1. **USURY OR OTHER ILLEGALITY IN OBLIGATION IS NO DEFENSE TO CREDITOR'S BILL**, brought by a judgment creditor to enforce satisfaction of his judgment recovered upon such obligation. The judgment can only be impeached upon a direct proceeding brought to reverse or annul it. *Bank of Wooster v. Stevens*, 619.

2. **NOTE TAKEN BY BANK IS VOID FOR USURY** when more than the rate per cent allowed by its charter is taken or reserved. *Russell v. Fallor*, 631.

See **ASSIGNMENT FOR BENEFIT OF CREDITORS**, 1.

VENDOR AND VENDEE.

1. **EQUITABLE TITLE ARISING OUT OF CONTRACT FOR SALE OF LAND** is a defense where law and equity are blended to an action instituted to recover the possession of the land. *Tibeau v. Tibeau*, 329.

2. **CONTRACT FOR SALE OF LAND UNDER WHICH PURCHASE MONEY HAS BEEN PAID** and possession delivered is a good defense to an action by the grantor to recover the possession of the land or of the title deeds delivered. *Id.*

3. **VENDOR AND VENDEE DO NOT STAND IN RELATION OF MORTGAGEE AND MORTGAGOR**, so that in equity the vendee will have the same time to perform that is given to a mortgagor to redeem. *Kirby v. Harrison*, 677.

4. **OUTSTANDING TITLES OR INCUMBRANCES PURCHASED IN BY VENDOR OR MORTGAGOR** inure to the benefit of the vendee. *Bush v. Cooper*, 270.

See **AGENCY**, 8-10; **CONTRACTS**, 1, 3; **COVENANTS**; **ESTOPPEL**, 2.

VENUE.

See **CRIMINAL LAW**, 1, 3.

VERDICT.

See CRIMINAL LAW, 10-13; FRAUD, 1; MARRIAGE AND DIVORCE, 3; PLEADING AND PRACTICE, 17, 18, 29, 30.

VESSELS.

See PARTNERSHIP, 2; SHIPPING; STATUTES, 1.

VESTED RIGHTS.

See CONSTITUTIONAL LAW, 2, 9.

VOLUNTEERS.

See EVIDENCE, 8.

WAIVER.

See NEGOTIABLE INSTRUMENTS, 7; NOTICE, 1.

WAREHOUSES.

See BAILMENTS, 1-4; NEGLIGENCE, 3.

WARRANTY.

See AGENCY, 5; INSURANCE—FIRE; SALES, 8-12.

WATERCOURSES.

1. BY COMMON LAW, PEOPLE HAVE RIGHT TO FISH IN SEA OR CREEKS, or arms thereof, as a public common piscary, and can not be restrained from exercising this right except in those places, creeks, or navigable rivers in which either the king or some particular subject has acquired a proprietary interest, exclusive of such common liberty. *Moulton v. Libbey*, 57.
2. SHORES OF SEA AND NAVIGABLE RIVERS, WITHIN FLUX AND REFLUX OF TIDE, belong *prima facie* to the king, and may belong to a subject; but the *jus privatum* of the proprietor is subject to the *jus publicum* which belongs to the king's subjects. *Id.*
3. WHATEVER RIGHT KING BY HIS PREROGATIVE HAD IN SHORES OF SEA and of navigable rivers, he held as a *jus publicum* in trust for the benefit of the people for the purposes of navigation and of fishery. *Id.*
4. COMMON RIGHT OF FISHERY IS CLEARLY RESERVED AND PRESERVED for the king's subjects by the saving clause of the grant from Charles I. to Sir Ferdinando Gorges of the province of Maine. This proviso exhibits a general intention, not only to preserve to the people their common right of fishery, but to afford unusual facilities for its exercise. *Id.*
5. TITLE TO SHORE ACQUIRED BY RIPARIAN PROPRIETOR UNDER COLONIAL ORDINANCE OF 1641 does not destroy the common right of navigation or of fishery thereon. *Id.*
6. COMMON RIGHT OF FISHERY INCLUDES FISHERY OF CLAMS and the right to dig for the same. *Id.*
7. FACT THAT PARTY HAS BEEN ACCUSTOMED FOR SIXTY YEARS TO DIG CLAMS on a certain flat, subject to the flux and reflux of the tide, is not evidence that he has any exclusive right therein. *Id.*

8. **STATE, REPRESENTING PEOPLE, MAY REGULATE COMMON RIGHTS** and privileges of fishing, and an act of the legislature intended to protect and further such rights is valid. *Id.*
9. **DOCTRINE OF ENGLISH COMMON LAW IN RELATION TO NAVIGABLE WATERS** can aid our American courts very little in the consideration of this question, as we have no navigable streams within the common-law significance of that term. Nor can the common-law doctrine as to rivers not navigable, yet public highways from their adaptation to public use, be fully and liberally adopted by us. *Moore v. Sanborne*, 209.
10. **AT COMMON LAW THOSE RIVERS ONLY ARE SUBJECT TO SERVITUDES OF PUBLIC INTERESTS** which are of common or public use for carriage of boats and lighters and for transportation of property, and which were susceptible of use by the public generally for navigation. Their adaptation to a particular use by individuals in the course of their trade, but not to general use, would not constitute them public highways. *Id.*
11. **IN UNITED STATES, PUBLIC RIGHT TO USE OF RIVERS FOR TRANSPORTATION PURPOSES** does not depend upon custom or general use, but this right exists upon all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use or the extent of such use. *Id.*
12. **FACT THAT FLOATABLE STREAM HAS NOT BEEN USED BY PUBLIC**, or has been used only by persons following a particular occupation, can not deprive it of its public character. In the new states of the Union, from necessity and the very nature of things, usage and custom can not be the foundation of the public right. *Id.*
13. **EASEMENT EXISTS IN FAVOR OF PUBLIC UPON FRESH-WATER RIVER OR STREAM**, if such stream is inherently and in its nature capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts, or logs. This leaves to the owners of the beds of such streams all modes of use not inconsistent with said easement. *Id.*
14. **CAPACITY OF STREAM TO FLOAT BOATS IS NO CRITERION** of the existence of a public easement upon it for the purposes of transportation. The servitude of the public depends rather upon the purpose for which the public requires the use of its streams than upon any particular mode of use; hence, in a region where the principal business is lumbering, or the pursuit of any particular branch of manufacture or trade, the public claim to a right of passage along its streams must depend upon their capacity for the use to which they can be made subservient. *Id.*
15. **EASEMENT OF PUBLIC FOR TRANSPORTATION PURPOSES** over a stream is not destroyed because such stream can not be used for that purpose at an ordinary stage of the water at all seasons of the year. It is a capacity to meet the public necessity which furnishes the true test. It is a valuable rather than a continual use which determines the public right. *Id.*

See CONSTITUTIONAL LAW, 3; JURISDICTION.

WAYS.

See EASEMENTS.

WILLS.

1. **TESTATOR NEED NOT DECLARE TO WITNESSES, NOR NEED THEY KNOW**, that the instrument which they attest at his request is his will. It is

- sufficient that he knows what the instrument is. No formal publication or declaration that it is his will is required. *Osborn v. Cook*, 155.
2. BEQUEST TO MARRIED WOMAN WILL NOT BE DEFEATED BY REASON OF LACHES of the husband in prosecuting her claim to the same. *Black v. Whitall*, 423.
 3. WHERE WILL DIRECTED THAT ADVANCEMENT should be deemed a part of the residue of the estate for the purpose of distribution among the legatees, and that the sum advanced should be deducted from the share of the child advanced, it was held that it was an intention to designate the mode of distribution in order to secure perfect equality among the legatees. *Id.*
 4. ADVANCEMENT AS SUCH NEVER DRAWS INTEREST. *Id.*
 5. WHERE P. MADE ASSIGNMENT OF PERSONALTY IN TRUST, for the benefit of his minor children, and delivered the same to the trustee, and afterwards made his will, giving his wife one third of his personal property and her dower in his real estate, *held*, that testator's wife had no right to share in the property mentioned in the trust. *Sanborn v. Goodhue*, 398.
 6. WILL CAN NOT BE CORRECTED BY EVIDENCE OF MISTAKE, so as to strike out the name of a legatee and insert that of another inadvertently omitted by the drawer or copyer; for there can be no revocation or alteration of a written will of personalty without the statutory forms, and the disappointed intention has not these forms. *Yates v. Cole*, 602.
 7. WILL IS NOT REVOKED BY ANY ACT OF SPOILATION OR DESTRUCTION not deliberately done, *animo revocandi*. *White v. Casten*, 585.
 8. WHERE REVOCATION OF WILL IS ATTEMPTED BY BURNING, there must be a present intent on the part of the testator to revoke, and this intent must appear by some act or symbol, appearing on the script itself, so that it may not rest upon mere parol testimony, and if the script is in any part burned or singed, it is sufficient to revoke the will. *Id.*
 9. WILL IS REVOKED BY BURNING where the testator threw it into the fire with the intent to revoke and destroy it, and after he had turned away his wife took the paper from the fire secretly and concealed it; and the testator up to the time of his death thought the will was destroyed, and so frequently expressed himself, the script having been burned through in three different places, the outside scorched, and the edges of the paper singed, although no word or letter of the writing was in any manner destroyed or obliterated. *Id.*
 10. DECREE DISMISSING BILL FILED TO SET ASIDE WILL, because its bequests were contrary to statute, does not estop the heirs from contesting the probate of the will on the ground of defect of execution. *Mason v. Alston*, 515.

See CHARITABLE USES, 2; GIFTS, 3; TRUSTS, 1-3.

WITNESSES.

1. OPINIONS OF WITNESSES ARE ADMISSIBLE if the connection between the fact and its experienced consequences lies within the limits of some art or science, and the witnesses are skilled in such art or science. *Hartford P. I. Co. v. Harmer*, 684.
2. WITNESS CAN NOT REFUSE, ON CROSS-EXAMINATION, TO ANSWER QUESTION, on the ground that it will criminate him, if, with knowledge of his priv-

illegals, he testified in his examination in chief concerning the same matter; he can not voluntarily state a part of a transaction and refuse to answer as to the residue. *Forster v. Pierce*, 152.

3. **LEADING QUESTION IS ONE WHICH DIRECTLY SUGGESTS ANSWER** required, or which embodies a material fact, and admits of a simple negative or affirmative. *Stringfellow v. State*, 247.

4. **WHERE QUESTION LEADING IN FORM IS ASKED** which merely relates to the subject-matter, it should be allowed. *Id.*

See **EVIDENCE**, 4; **INSURANCE—FIRE**, 36; **WILLS**, 1.

WRECKS.

See **SHIPPING**.

WRITS OF ERROR.

See **CRIMINAL LAW**, 12; **QUO WARRANTO**.

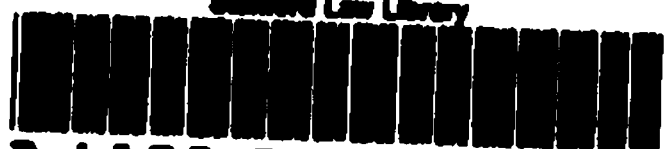
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